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THE

LAWS OF ENGLAND.

VOLUME VI.

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THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

1885-86, 1886-92, and 1895-1905,

AND OTHER LAWYERS.

VOLUME VI.

COMPULSORY PURCHASE OF LAND AND COMPENSATION.

CONFLICT OF LAWS.

CONSTITUTIONAL LAW (Parts I.—V.).

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LONDON:

BUTTERWORTH & CO., 11 & 12, BELL YARD, TEMPLE BAR.

Law Publishers.

1909.

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

Editor in Chief.

THE RIGHT HONOURABLE THE

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Consular Officers - - - - ,, CONSTITUTIONAL LAW.

Contracts, generally - - - ,, CONTRACT.

Copyright - - - - - ,, COPYRIGHT AND LITERARY PROPERTY.

Criminal Jurisdiction - - - ,, CRIMINAL LAW AND PROCEDURE.

Devolution of Property - - - ,, DESCENT AND DISTRIBUTION.

Divorce, generally - - - - ,, HUSBAND AND WIFE.

Domicil of Companies - - - ,, COMPANIES.

Domicil of Corporations - - ,, CORPORATIONS.

Extradition - - - - ,, EXTRADITION AND FUGITIVE OFFENDERS.

Foreign Bankruptcy - - - ,, BANKRUPTCY AND INSOLVENCY.

Foreign Corporations - - ,, CORPORATIONS.

Foreign Enlistment - - - ,, CRIMINAL LAW AND PROCEDURE.

Foreign Jurisdiction - - - ,, CONSTITUTIONAL LAW.

Foreign Relations - - - - ,, CONSTITUTIONAL LAW.

Fugitive Offenders - - - ,, EXTRADITION AND FUGITIVE OFFENDERS.

Judicial Notice - - - - ,, EVIDENCE.

Jurisdiction - - - - ,, COURTS.

Legitimation - - - - ,, BASTARDY.

Marriages, generally - - - ,, HUSBAND AND WIFE.

Matrimonial Causes, generally - ,, HUSBAND AND WIFE.

Naturalization and Denizens - ,, ALIENS.

Negotiable Instruments - - - ,, BILLS OF EXCHANGE ETC.

Offences relating to Foreign Nations ,, CRIMINAL LAW AND PROCEDURE.

Prize Law - - - - - ,, PRIZE LAW AND JURISDICTION.

Proof of Foreign Law - - - ,, EVIDENCE.

Royal Marriages - - - - ,, CONSTITUTIONAL LAW.

Shipping Law, generally - - ,, ADMIRALTY; SHIPPING AND NAVIGATION.

Taking Evidence Abroad - - ,, EVIDENCE.

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For Act of Grace - - - *See title* PARLIAMENT.
Act of Parliament - - ,, PARLIAMENT; STATUTES.
Acts of State - - - ,, PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
Aliens - - - - ,, ALIENS.
Army - - - - ,, ROYAL FORCES.
Audit of Public Accounts - ,, REVENUE.
Church Land - - - ,, ECCLESIASTICAL LAW.
Church Law - - - ,, ECCLESIASTICAL LAW.
Coinage Offences - - ,, CRIMINAL LAW AND PROCEDURE.
Colonies - - - - ,, DEPENDENCIES AND COLONIES.
Comptroller and Auditor General - - - ,, REVENUE.
Consolidated Fund - - ,, REVENUE.

For Constitution of Courts	*See title*	COUNTY COURTS; COURTS.
Coroners	,,	CORONERS.
Courts of Cinque Ports	,,	COURTS.
Courts Martial	,,	COURTS; ROYAL FORCES.
Crown Office	,,	CROWN PRACTICE.
Customs Duties	,,	REVENUE.
Denization and Naturalization	,,	ALIENS.
Dependencies	,,	DEPENDENCIES AND COLONIES.
Dignities and Honours	,,	DIGNITIES.
Durham Chancery Court	,,	COURTS.
Elections	,,	ELECTIONS.
Escheat	,,	CROWN PRACTICE; REAL PROPERTY AND CHATTELS REAL.
Exchequer	,,	REVENUE.
Excise	,,	REVENUE.
Forfeiture	,,	CRIMINAL LAW AND PROCEDURE; REAL PROPERTY AND CHATTELS REAL.
Franchise	,,	FERRIES; FISHERIES; MARKETS AND FAIRS; and titles *passim*.
Habeas Corpus	,,	CROWN PRACTICE.
House of Commons	,,	PARLIAMENT.
House of Lords	,,	COURTS; PARLIAMENT.
Judges	,,	COUNTY COURTS; COURTS; MAGISTRATES.
King's Remembrancer	,,	CROWN PRACTICE.
Lancaster Chancery Court	,,	COURTS.
Legislature	,,	PARLIAMENT.
Letters Patent	,,	DIGNITIES; PATENTS AND INVENTIONS.
Licences	,,	REVENUE.
Monopolies	,,	PATENTS AND INVENTIONS.
National Debt	,,	REVENUE.
Navy	,,	ROYAL FORCES.
Neutrality	,,	CRIMINAL LAW; SHIPPING AND NAVIGATION.
Parliament	,,	PARLIAMENT.
Paymaster-General	,,	REVENUE.
Peers	,,	DIGNITIES; PARLIAMENT.
Petition of Right	,,	CROWN PRACTICE.
Post Office	,,	POST OFFICE.
Private Bills	,,	PARLIAMENT.
Prize Law	,,	PRIZE LAW AND JURISDICTION.
Provisional Orders	,,	PARLIAMENT.
Public Revenue	,,	REVENUE.
Rating of Ambassadors, Government Buildings and Crown Property	,,	RATES AND RATING.
Revenue	,,	REVENUE.
Royal Forces	,,	ROYAL FORCES.
Sheriffs	,,	SHERIFFS AND BAILIFFS.
Taxes	,,	REVENUE; and titles *passim*.
Territorial Force	,,	ROYAL FORCES.
Trial by Jury	,,	JURIES.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 1 vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814

Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855
Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
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In connection with the acquisition of land for particular purposes, see also titles:— ALLOTMENTS; BURIAL AND CREMATION; CHARITIES; ECCLESIASTICAL LAW; EDUCATION; ELECTRIC LIGHTING; GAS; HIGHWAYS, STREETS AND BRIDGES; MARKETS AND FAIRS; METROPOLIS; MINES, MINERALS AND QUARRIES; OPEN SPACES AND RECREATION GROUNDS; POST OFFICE; PRISONS AND REFORMATORIES; PUBLIC HEALTH ETC.; RAILWAYS AND CANALS; ROYAL FORCES; SEWERS AND DRAINS; SMALL HOLDINGS; TELEGRAPHS AND TELEPHONES; TRAMWAYS AND LIGHT RAILWAYS; WATER SUPPLY.

Part I.—Compulsory Powers over Land.

SECT. 1.—*Grant of Powers by Parliament.*

Application of terms.

1. Owners of land may be required by the Legislature to surrender some or all of the rights they possess in or over their land for purposes of public utility. When the land itself has to be surrendered it is said to be compulsorily taken or purchased, but if some only of the rights in or over the land are required to be given up, as when an easement appurtenant to the land is destroyed, the land is commonly said to be injuriously affected (*a*). In practice the distinction between these cases is not always logically observed.

Creation of powers.

The necessary authority to take or injuriously affect land is obtained from Parliament, either directly by an Act passed for the purpose, or indirectly under Acts containing general powers which may be exercised for particular purposes and upon certain conditions. The former class of Act usually specifies the land which may be taken, and limits the time within which the acquisition must take place, the latter class contains no such limitations, but in many cases some form of order is required before the

(*a*) See s. 68 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); and for examples see *Clark* v. *London School Board* (1874), 9 Ch. App 120; *Emsley* v. *North Eastern Rail. Co.*, [1896] 1 Ch. 418, C. A.

SECT. 1. Grant of Powers by Parliament.

powers can be put into force, and in this order these limitations may be, and generally are, inserted. The authorised use of the land taken may involve the injurious affection of other land, but, in addition to this, Parliament often grants specific power to interfere with land, as, for example, to lay sewers and pipes (*b*), and this power is frequently granted so as to be exercised as occasion may require, according to the discretion of the person or authority upon whom the right is conferred.

How powers obtained.

There are three ways of obtaining compulsory powers over land: (1) by the passing of a public general Act, (2) by promoting a private Bill which when passed becomes a local and personal Act, and (3) by proceeding under existing Acts to obtain an order which is commonly referred to as a provisional order.

SECT. 2.—*By Public Bill and General Act.*

(1) By General Act.

2. When land is required for one of the Government departments or is to be purchased with public money, it is not unusual for the Government to introduce as a public Bill the measure authorising the compulsory purchase of specific land (*c*). The body or person mentioned in the Bill can, after it passes, proceed directly to acquire the land in accordance with the provisions of the Act. Besides these Acts, there are other public general Acts directly authorising the compulsory purchase of land for particular purposes, but without specifying the land. In most cases, before the land can be taken, Parliament requires that the permission of some independent authority shall be obtained; but there are certain statutes under which the power can be exercised without any such intervention. Such power is usually conferred upon a Government department.

Government Departments.

3. The Admiralty, for example, may compulsorily acquire ground for signal stations under the Admiralty (Signal Stations) Act, 1815 (*d*), and for coastguard stations under the Coastguard Service Act, 1856 (*e*), while both the Admiralty and the Secretary of State for War may take land for the defence of the realm, without any further order or permission, if the enemy have actually invaded the country (*f*), but, except in that event, a

(*b*) As to laying sewers or pipes, see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 54, and Acts incorporating the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28, 34, or the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 6. And see titles GAS; SEWERS AND DRAINS; WATER SUPPLY.

(*c*) *E.g.*, Land Registry (New Buildings) Act, 1900 (63 & 64 Vict. c. 19).

(*d*) 55 Geo. 3, c. 128.

(*e*) 19 & 20 Vict. c. 83, s. 5, incorporating ss. 336—345 of the Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107).

(*f*) Defence Act, 1842 (5 & 6 Vict. c. 94), ss. 16 *et seq.* The Naval Works Act, 1895 (58 & 59 Vict. c. 35), s. 2, extended the provisions of the Defence Acts to land required for the purposes of the navy. The Defence Act, 1842, has been amended by the Defence Acts of 1854 (17 & 18 Vict. c. 67), of 1859 (22 Vict. c. 12), and of 1860 (23 & 24 Vict. c. 112), and by the Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117); Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 8; Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 7; Defence Acts Amendment Act, 1873 (36 & 37 Vict. c. 72); Ranges Act, 1891 (54 & 55 Vict. c. 54), s. 11; and see Part XIV., p. 158, *post.*

SECT. 2. By Public Bill and General Act.

certificate of the necessity or expediency of taking the land is required to be given by the Lord Lieutenant or Governor or by two deputies, and also an authorisation by a warrant of the Treasury (*g*). The Treasury have also power to take lands for the purpose of erecting watch-houses, dwelling-houses, and other buildings requisite for the security and protection of the revenues of customs and excise (*h*). A Secretary of State has also power, with the consent of the Treasury, to acquire compulsorily lands contiguous to a prison, and required for the purpose of enlarging such prison or rendering it more commodious and safe (*i*), and also to acquire town halls, court-houses, and other rooms situate within the curtilage of a prison or forming part of a prison, and used for purposes other than those connected with the management of a prison (*k*).

Trinity House.

The Trinity House, which is not a Government department (*l*), is authorised to take lands for the exercise of its lighthouse powers, or for the maintenance of works, or for the residence of the lightkeepers (*m*).

Commissioners of sewers.

Commissioners of sewers are also authorised by the Sewers Act, 1833 (*n*), to purchase and take land for the purpose of altering, repairing, and widening existing drainage works, and the Ecclesiastical Commissioners have certain powers of compulsory acquisition of land for building or extending churches in parishes and extra-parochial places (*o*). Bodies having the powers of surveyors of highways can upon an order of justices acquire lands for the widening of certain narrow highways (*p*).

SECT. 3.—*By Private Bill for a Local and Personal Act.*

(2) By Private Bill.

4. When local authorities, or incorporated or other companies, or individuals desire to obtain powers to carry out undertakings, which involve the compulsory purchase of or interference with land, and these powers cannot be obtained under existing statutes, they may apply to Parliament to grant them the necessary authority. This is done by promoting a private Bill.

Procedure.

The procedure is regulated by the standing orders of Parliament,

(*g*) Defence Act, 1842 (5 & 6 Vict. c. 94), s. 23.

(*h*) Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107), ss. 335—341 and 345, and Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 275 and 276, which powers were continued in force by the Customs Buildings Act, 1879 (42 & 43 Vict. c. 36), s. 6. Under the last-mentioned Act, s. 5, the Commissioners of Works are empowered to purchase by agreement land for the purpose of the Customs; see p. 161, *post*.

(*i*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 44; Prison Act, 1884 (47 & 48 Vict. c. 51), s. 2. And see title PRISONS AND REFORMATORIES.

(*k*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 49; and Prison Act, 1884 (47 & 48 Vict. c. 51), s. 2; and see p. 162, *post*.

(*l*) *Gilbert* v. *Trinity House Corporation* (1886), 17 Q. B. D. 795.

(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 634, 638, 639.

(*n*) 3 & 4 Will. 4, c. 22, ss. 24—40; and see further the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), and the Land Drainage Act, 1847 (10 & 11 Vict. c. 38), ss. 9—11. And see title SEWERS AND DRAINS.

(*o*) Church Building Act, 1818 (58 Geo. 3, c. 45), s. 52. And see title ECCLESIASTICAL LAW.

(*p*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 82. And see title HIGHWAYS, STREETS AND BRIDGES.

SECT. 3. By Private Bill for a Local and Personal Act.

which are altered and amended annually (*q*). Under these orders it has long been necessary, when power is sought to take lands compulsorily, for the promoters of the Bill to show that notice has been given to the persons likely to be affected, and to deposit plans with books of reference showing the lands proposed to be taken and the names of the owners and lessees or reputed owners and lessees and of the occupiers of such lands (*r*).

Effect of Act.

The Bill, when it passes, authorises the compulsory taking of such of these lands so shown and described as are required for the purposes of the undertaking.

Time limit.

A time limit of three years is generally imposed for the exercise of compulsory purchase (*s*), and in most recent Acts there is inserted a further time limit for the execution of the works (*a*).

Local and Personal Act.

These Bills on passing are classed as local and personal Acts in the statute book (*b*). Among local and personal Acts a few instances will be found in which land not specifically described is authorised to be taken from time to time as required. The Metropolitan Paving Act, 1817, is an example of this (*c*). Under its provisions land may be taken as occasion requires for the purpose of widening and improving the streets in the metropolis (*d*).

SECT. 4.—*By Provisional Order.*

(3) By Provisional Order.

5. In order to save the expense and trouble of proceeding by private Bill to obtain compulsory powers to acquire land, Parliament has in a number of public general Acts provided simpler methods of procedure. This procedure varies somewhat in the different Acts, but its principal characteristic is that an order conferring the powers is made by some person or body mentioned in the particular statute, which order, however, is not operative until it has been confirmed in manner provided in the general Act. Until that has taken place it is said to be provisional only; hence this method of obtaining compulsory powers is known as procedure by provisional order.

Procedure.

6. The main features are alike in the different statutes (*e*). The first requisite is that the person or body seeking the power

(*q*) See title PARLIAMENT, where the procedure in connection with private Bill legislation is fully treated.

(*r*) Standing Orders of the Houses of Parliament, Orders 3—5, 9—11 of both Houses, which relate to notices, and Orders 24, 28, 29, 40 and 46, which relate to deposit of plans and books of reference. And see title PARLIAMENT.

(*s*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 123, and p. 63, *post*.

(*a*) *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480, *per* Lord BLACKBURN, at p. 496. The time limit, however, does not affect rights apart from the statute (*Great Western Rail. Co.* v. *Midland Rail. Co.*, [1908] 2 Ch. 644, C. A.).

(*b*) The distinction between general Acts and local and personal Acts depends upon a resolution of the House of Commons passed on the 8th May, 1801, and agreed to by the House of Lords, that the general statutes and the "public, local, and personal Acts" in each session should be classed in separate volumes. See *Richards* v. *Easto* (1816), 15 M. & W. 244, *per* PARKE, B., at p. 251; and title PARLIAMENT.

(*c*) 57 Geo. 3, c. xxix., usually known as Michael Angelo Taylor's Act.

(*d*) *Ibid.*, ss. 80—96; and see title METROPOLIS.

(*e*) See, for example, Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 175—178; Military Lands Act, 1892 (55 & 56 Vict. c. 43), ss. 1, 2.

SECT. 4. By Provisional Order.

should give ample notice of their intention. This is done by advertisements in the local newspapers, in which full particulars are given, and by the service of notices on every owner, lessee or occupier, or reputed owner, lessee or occupier of the lands proposed to be taken. The next step is to petition the authority who have the power to make the order. This authority is usually one of the Government departments. Thus, under the Public Health Act 1875 (*f*), and under most Acts relating to local government, the authority to make the order is the Local Government Board; under Acts relating to trade undertakings it is usually the Board of Trade (*g*); under the Education Acts it is the Board of Education (*h*); while under the Military Lands Act, 1892 (*i*), the Secretary of State or the Admiralty, as the case may be, makes the order. The petition must give full particulars and be supported with evidence to show compliance with the provisions of the Act. If the authority are satisfied with that evidence, they will consider the petition, and if in their view the matter should proceed, they direct that a local inquiry shall be held, at which all persons affected have an opportunity of being heard. The making of the provisional order empowering the petitioners to acquire the land follows, if the authority are satisfied on the report of the person holding the inquiry. It has next to be confirmed, and in the majority of cases confirmation is obtained by the passing by Parliament of a confirming Act, the Bill for which is usually submitted by the department making the order. In its passage through Parliament it is treated as a private Bill, and owners of the land proposed to be taken or injuriously affected may oppose its passage before the Select Committees of both Houses (*k*). Most of the Acts under which provisional orders are made provide that the confirming Act shall be deemed a public general Act of Parliament (*l*).

Petition for order.

Local inquiry.

Confirmation.

7. In some recent Acts the above procedure has been considerably modified. Thus, a parish council, if desirous of acquiring land compulsorily for certain specific purposes, are authorised to make a representation to the county council, whereupon the county council gives the necessary notices, holds the local inquiry, and makes the necessary order, or, if they refuse, the Local Government Board, if petitioned, may do so. This order is served on the persons interested, and if no memorial is presented against it by a person interested within a certain time, it becomes final, if approved by the Local Government Board. If there is such a memorial, a further inquiry may be held by that Board; and if they are satisfied they may confirm the order, which has then the effect of an Act of

Variations in procedure.

(*f*) 38 & 39 Vict. c. 55, s. 176.
(*g*) *E.g.*, Railways (Electrical Power) Act, 1903 (3 Edw. 7), c. 30.
(*h*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 20.
(*i*) 55 & 56 Vict. c. 43, s. 2, extended to the Admiralty by the Naval Works Act, 1895 (58 & 59 Vict. c. 35), s. 2.
(*k*) Standing Orders of the Houses of Parliament. And see title PARLIAMENT for details as to private Bill procedure.
(*l*) In the authorised edition of the statutes they are, however, printed and numbered with the local and personal Acts.

SECT. 4. By Provisional Order.

Parliament (*m*). A somewhat similar procedure is provided for the compulsory purchase of land for small holdings and allotments and for the compulsory hiring of land for allotments (*n*). Another instance of Parliament having delegated its powers to sanction the compulsory purchase of land will be found in the Light Railways Act, 1896 (*o*), under which the order is made by the Light Railway Commissioners and confirmed by the Board of Trade.

Who may obtain orders.

8. The right to proceed by provisional order to obtain compulsory powers of taking land is conferred for specific purposes on certain departments of the State, on local authorities, corporate bodies, and others. Of Government departments, a Secretary of State has this right in order to obtain land for military purposes (*p*) and for military tramways (*q*), the Admiralty for naval purposes and tramways (*r*), the Postmaster-General for post-office (*s*) and telegraph purposes (*t*). In regard to local authorities, powers may be obtained by provisional order to acquire land for the purposes of the Public Health Acts (*a*), of the Housing of the Working Classes Acts (*b*), of the Elementary Education Acts (*c*), for isolation hospitals (*d*), for the purpose of the Diseases of Animals Act, 1894 (*e*), for allotments and small holdings (*f*), and for the various purposes of the Local Government Acts,

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9, amended by Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), which was in turn repealed by the Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36).

(*n*) Small Holdings and Allotments Act, 1908 (8 Edw 7, c. 36), ss. 7, 25, 38, 39, and Sched. I.; and see p. 168, *post*, and titles ALLOTMENTS, Vol. I., p. 348; SMALL HOLDINGS. See Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 5, for another similar provision.

(*o*) 59 & 60 Vict. c. 48.

(*p*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), ss. 1, 2; Military Lands Act, 1900 (63 & 64 Vict. c. 56) s. 4; and Military Lands Act, 1903 (3 Edw. 7, c. 47), (extended to naval volunteers by the Naval Lands (Volunteers) Act, 1908 (8 Edw. 7, c. 25)); see also Military Forces Localisation Act, 1872 (35 & 36 Vict. c. 68).

(*q*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65).

(*r*) Naval Works Act, 1895 (58 & 59 Vict. c. 35), s. 2, extending to the Admiralty the powers under the Military Lands Act, 1892 (55 & 56 Vict. c. 43) (see note (*p*), *supra*), and other Acts. The powers under the Military Tramways Act, 1887 (50 & 51 Vict. c. 65), are extended to the Admiralty by the Naval Works Act, 1899 (62 & 63 Vict. c. 42).

(*s*) Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20), s. 3. Under this Act no provisional order is in fact required. And see title POST OFFICE.

(*t*) Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 2, extending the provisions of the Telegraph Act, 1863 (26 & 27 Vict. c. 112), and the Telegraph Act, 1878 (41 & 42 Vict. c. 76). And see title TELEGRAPHS AND TELEPHONES.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 176, 297. And this power may be extended on certain conditions to highway purposes (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53)).

(*b*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 20, 39, 57, amended and extended by the Housing of the Working Classes Act, 1900 (63 & 64 Vict. c. 59), and the Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39).

(*c*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), ss. 19, 20.

(*d*) Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68).

(*e*) 57 & 58 Vict. c. 57, s. 33.

(*f*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), which repealed and consolidated the previous enactments relating to the supply of small holdings and allotments by local authorities.

1888 and 1894 (*g*). Commissioners of sewers have like rights for the purposes of the Land Drainage Act, 1861 (*h*), Lloyd's for signal stations and houses and telegraphic communication therewith (*i*), and railway companies for the purpose of introducing and using electricity on railways (*k*). The procedure under the Light Railways Act, 1896 (*l*), is open to local authorities, companies, and individuals.

SECT. 4. By Provisional Order.

In addition to the Acts providing for the compulsory acquisition of land by means of a provisional order, there are others which enable powers to be obtained by provisional order for the construction of works and the carrying on of undertakings which involve an interference with or an injurious affection of land although no plot of land may be actually taken (*m*).

Injurious affection.

Part II.—Conditions attached to the Powers.

SECT. 1.—*Before the Lands Clauses Consolidation Act*, 1845.

9. When Parliament has authorised the compulsory acquisition of land it has almost invariably provided for the payment of a money compensation to the person deprived of his interest in it. The exceptions to this rule occur in cases where the interest of the owner may generally be considered as of nominal value, as, for example, an owner's interest in the subsoil of streets (*n*). When power is given injuriously to affect land, it is now also an almost invariable requirement that full compensation shall be made for damage caused by reason of the execution of the works. This provision was, however, often omitted in the older Acts (*o*). The legislation in regard to compulsory purchase and compensation has shown a continual growth, alike to meet the requirements of new undertakings and to protect more efficiently the rights of

When compensation payable.

(*g*) 51 & 52 Vict. c. 41, s. 65; 56 & 57 Vict. c. 73, ss. 9, 10.
(*h*) 24 & 25 Vict. c. 133, ss. 21 *et seq.*
(*i*) Lloyd's Signal Station Act, 1888 (51 & 52 Vict. c. 29).
(*k*) Railways (Electrical Power) Act, 1903 (3 Edw. 7, c. 30).
(*l*) 59 & 60 Vict. c. 48.
(*m*) *E.g.*, Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), amended by the Gas and Water Works Facilities Act Amendment Act, 1873 (36 & 37 Vict. c. 89); Electric Lighting Acts, 1882 and 1888 (45 & 46 Vict. c. 56 and 51 & 52 Vict. c. 12); Tramways Act, 1870 (33 & 34 Vict. c. 78); Land Drainage Act, 1861 (24 & 25 Vict. c. 133); Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43).
(*n*) *E.g.*, under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 44 (2), the subsoil of any road in London is vested in the sanitary authority for the purpose of providing sanitary conveniences, and no provision appears to have been made for payment of compensation to the owner. See *London and North Western Rail. Co.* v. *Westminster Corporation*, [1904] 1 Ch. 759, *per* VAUGHAN WILLIAMS, L.J., at pp. 765, 766, and *per* COZENS-HARDY, L.J., at p. 772, C. A.
(*o*) *E.g.*, the Turnpike Act, 1822 (3 Geo. 4, c. 126), discussed in *Boulton* v. *Crowther* (1824), 2 B. & C. 703; and see *Ferrar* v. *Commissioners of Sewers in the City of London* (1869), L. R. 4 Exch. 227, Ex. Ch.; *R.* v. *London Corporation* (1867), L. R. 2 Q. B. 292.

SECT. 1. Before the Lands Clauses Consolidation Act, 1845.

property (*p*). Before the passing of the Lands Clauses Consolidation Act, 1845 (*q*), it was usual to insert in the particular Acts authorising the compulsory purchase all the provisions dealing with the procedure to take land and to pay compensation. These varied according to the nature of the proposed undertaking, and thus led to considerable confusion. There are still a few of these Acts in operation (*r*), but, save for the Metropolitan Paving Act, 1817 (*s*), very little use is now made of them. Their particular provisions must be followed, but they may be regarded as exceptions to the general procedure as hereinafter stated.

SECT. 2.—*By the Lands Clauses Acts.*

SUB-SECT. 1.—*Incorporation of the Acts.*

Lands Clauses Acts.

10. The Lands Clauses Consolidation Act, 1845 (*t*), was passed in order to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be paid for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves (*a*). It has been amended by Acts passed in 1860 (*b*), 1869 (*c*), 1883 (*d*), and 1895 (*e*). The Act of 1845 and these amending Acts, and any amending Acts for the time being in force, are known, as respects England and Wales, as the "Lands Clauses Acts," and that expression is used in Acts of Parliament as meaning these Acts (*f*).

Incorporation in special Act.

The Lands Clauses Acts apply to every undertaking of a public nature (*g*) authorised by any Act passed after the 8th May, 1845 (*h*), which empowers the purchase or taking of lands for that

(*p*) The earliest Act on the subject appears to be one for supplying Gloucester with water in 1541-2, called "the Bill for the conduyttes at Gloucester" (33 Hen. 8, c. 35). There was a similar Act for London in 1543-4 (35 Hen. 8, c. 10). The Act for rebuilding London after the Great Fire (19 Car. 2, c. 3) is a later example, and embodies the principle of "betterment."

(*q*) 8 & 9 Vict. c. 18.

(*r*) The principal general Acts passed before 1845 and now in force allowing compulsory purchase are—Admiralty (Signal Stations) Act, 1815 (55 Geo. 3, c. 128); Sewers Act, 1833 (3 & 4 Will. 4, c. 22); Highway Act, 1835 (5 & 6 Will. 4, c. 50); Defence Act, 1842 (5 & 6 Vict. c. 94).

(*s*) 57 Geo. 3, c. xxix.

(*t*) 8 & 9 Vict. c. 18.

(*a*) Preamble to Act. It is important to bear this object in mind in construing the Act (*Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425, *per* Lord BLACKBURN, at p. 440).

(*b*) Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106).

(*c*) Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18).

(*d*) Lands Clauses (Umpire) Act, 1883 (46 & 47 Vict. c. 15).

(*e*) Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11).

(*f*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 23.

(*g*) They do not apply to matters sanctioned by private Acts, such as those relating to estates (*Wale* v. *Westminster Palace Hotel Co.* (1860), 8 C. B. (N. S.) 276; *Re Sion College, Ex parte London Corporation* (1886), 55 L. T. 589).

(*h*) The date of the passing of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

undertaking (*i*). They are incorporated with such Act, and all their clauses and provisions apply to the undertaking, so far as they are applicable, unless they are expressly varied by such Act (*k*). The Act with which they are incorporated is defined as "the special Act" (*l*). It is usual in the special Act to incorporate the Lands Clauses Acts in express terms. They even apply to undertakings authorised by Acts passed prior to the 8th May, 1845, if the Act authorising them is varied by a subsequent Act which provides for the taking of other lands for the same undertaking, in which case they apply to the whole undertaking (*m*) so far as applicable (*n*).

Grouping of clauses.

11. It is sometimes convenient to incorporate in special Acts some portion only of the Lands Clauses Consolidation Act, 1845. To enable this to be done, the Act is divided into groups of clauses. There are sixteen of these groups and nine ungrouped clauses (*o*), each group and each ungrouped clause forming an independent enactment. The groups are preceded by headings or words introductory to the enactment with respect to each matter (*p*).

(*i*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 1.

(*k*) *Ibid.*

(*l*) *Ibid.*, s. 2. In Acts authorising the granting of provisional orders, provision is sometimes made as to what is to be deemed the special Act, *e.g.*, Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20), s. 3 (2).

(*m*) *Lancashire and Yorkshire Rail. Co.* v. *Evans* (1851), 15 Beav. 322; *Re London and Birmingham Rail. Co. Act* (1833), *Re London and North Western Rail. Co. Act* (1846), *Ex parte Eton College* (1850), 20 L. J. (CH.) 1. The question has arisen mainly in respect of costs in regard to money deposited in court, but since the Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5, this point is not very material. See *Re Holden's Estate* (1855), 1 Jur. (N. S.) 995; *Re Ellison's Estate* (1856), 8 De G. M. & G. 62; *Re Cherry's Settled Estate* (1862), 31 L. J. (CH.) 351; *Re Westminster Estate of St. Sepulchre (Parish), Ex parte St. Sepulchre (Vicar)* (1864), 4 De G. J. & Sm. 232; *Re Spitalfields Schools and Commissioners of Woods and Forests* (1870), L. R. 10 Eq. 671; *Re St. Dunstan-in-the-West Charity Schools* (1871), L. R. 12 Eq. 537; *Re Wood, Ex parte Commissioners of Works and Buildings* (1886), 31 Ch. D. 607, C. A.; *Re Mills, Ex parte Commissioners of Works and Public Buildings* (1886), 34 Ch. D. 24, C. A.; and see Part XII., p. 124, *post*.

(*n*) *E.g.*, s. 16, relating to subscription of capital, may not be applicable to the extension of a previously authorised undertaking (*Weld* v. *South Western Rail. Co.* (1863), 33 L. J. (CH.) 142; *R.* v. *Great Western Rail. Co.* (1852), 1 E. & B. 253).

(*o*) 8 & 9 Vict. c. 18, ss. 1, 5, 92, 123, 133—135, 149 and 152.

(*p*) The groups of clauses, with the introductory words with respect to each matter, are as follows:—

Ss. 2—4, the construction of this Act and of Acts to be incorporated therewith.

Ss. 6—15, the purchase of lands by agreement.

Ss. 16—68, the purchase and taking of lands otherwise than by agreement.

Ss. 69—80, the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title.

Ss. 81—83, the conveyance of lands.

Ss. 84—91, the entry upon land by promoters of the undertaking

Ss. 93—94, small portions of intersected land.

Ss. 95—98, copyhold lands.

Ss. 99—107, copyhold lands, being common or waste lands.

Ss. 108—114, lands subject to mortgage.

Ss. 115—118, lands charged with any rent service, rent-charge, chief

SECT. 2. By the Lands Clauses Acts.

When it is desired to incorporate any particular set of clauses in the special Act it is sufficient to enact that the clauses with respect to the matter so proposed to be incorporated shall be incorporated, describing such matter as it is described in the introductory words to the enactment with respect to such matter; and thereupon all the clauses and provisions with respect to the matter so incorporated become part of the incorporated Act, save in so far as they are expressly varied or excepted (*q*). When the Act as a whole is incorporated groups of clauses may in the same way be excluded, and if the introductory words of a group are used in the provision as to exclusion, all the clauses coming under that heading will be deemed excluded, while all the other sections of the Act will be deemed included (*r*).

SUB-SECT. 2.—*Construction of the Acts.*

Definitions. Prescribed.

12. In construing the Lands Clauses Acts certain words have defined meanings. "Prescribed" means prescribed or provided for in the special Act, and the sentence in which such word occurs is construed as if, instead of the word "prescribed," the expression "prescribed for that purpose in the special Act" had been used (*s*).

Works or undertaking.

The expression "the works" or "the undertaking" means the works or undertaking, of whatever nature, authorised by the special Act to be executed (*t*), and the expression "the promoters of the undertaking" means the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, empowered by the special Act to execute such works or undertaking (*a*). They are referred to hereafter as the promoters. Certain other words and expressions have meanings assigned to them both in the Lands Clauses Acts and in the special Act, unless there be something

Promoters.

or other rent, or other payment or incumbrance not hereinbefore provided for.

Ss. 119—122, lands subject to leases.

Ss. 124—126, interests in land which have by mistake been omitted to be purchased.

Ss. 127—132, lands acquired by the promoters of the undertaking under the provisions of this or the special Act or any Act incorporated therewith; but which shall not be required for the purposes thereof.

Ss. 136—149, the recovery of forfeitures, penalties, and costs.

Ss. 150, 151, the provision to be made for affording access to the special Act by all parties interested.

The ungrouped clauses and the matters to which they relate are—s. 1, application of Act; s. 5, incorporation of portions of Act; s. 92, sale of part of a house or building; s. 123, limit of time for compulsory purchase; s. 133, land tax and poor's rate to be made good; s. 134, service of notices upon company; s. 135, tender of amends; s. 149, persons giving false evidence; s. 152, extent of Act.

(*q*) S. 5.

(*r*) *R.* v. *London Corporation* (1867), L. R. 2 Q. B. 292. Thus, if an Act incorporates the Lands Clauses Acts with the exception of the clauses "with respect to the purchase and taking of lands otherwise than by agreement," all the sections, namely ss. 16—68 inclusive, which come under that heading, will be excluded (*Ferrar* v. *Commissioners of Sewers in the City of London* (1869), L. R. 4 Exch. 227, Ex. Ch.; *Dungey* v. *London Corporation* (1869), 38 L. J. (C. P.) 298).

(*s*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 2.

(*t*) *Ibid.*

(*a*) *Ibid.*

either in the subject or context repugnant to such construction (*b*). Thus, the word "lands" extends to messuages, lands, tenements, and hereditaments of any tenure (*c*). As used in several sections it includes incorporeal hereditaments, but in others it does not (*d*), and, unless otherwise provided, it will not include a particular stratum of land (*e*). In provisions where notice is required to be given to the owner of any lands, or where the authority or consent of any such owner is required to some act, the word "owner" means any person or corporation who under the provisions of the Lands Clauses Acts or the special Act would be entitled to sell and convey lands to the promoters of the undertaking (*f*).

Lands.

Owner.

13. The special Act and the Lands Clauses Acts when incorporated are construed together as forming one Act (*g*). If certain groups of clauses only are incorporated in the special Act, they likewise are deemed to form part of the special Act, and it is construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such Act relates (*h*). In construing the special Act and the provisions of the Lands Clauses Acts together questions have arisen as to the extent to which the former has varied the latter. The rule is that the Lands Clauses Acts are to be followed unless the special Act by express words or necessary intendment varies or excepts them (*i*). A variation showing that a provision is inapplicable will have the same effect as an express variation (*k*), but it is confined to the particular subject-matter to which it relates, and if the special Act relates to other matters, the variation will not extend to them (*l*).

Construction of Acts.

Difficulties of construction have also arisen owing to words being used in special Acts to include or exclude clauses different from the statutory headings to the various groups. In such cases effect

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 3. For examples of repugnancy, see *Clark* v. *London School Board* (1874), 9 Ch. App. 120; *Worsley* v. *South Devon Rail. Co.* (1851), 16 Q. B. 539.

(*c*) *Ibid.*

(*d*) *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, *per* Lord WATSON, at pp. 800 *et seq.*, *per* Lord BRAMWELL, at p. 808; *R.* v. *Cambrian Rail. Co.* (1871), L. R. 6 Q. B., *per* COCKBURN, C.J., 427, *per* BLACKBURN, J., at p. 431, which was overruled on another point in *Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224, C. A.; *Hill* v. *Midland Rail. Co.* (1882), 21 Ch. D. 143; *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 1 K. & J. 34; *Re Brewer* (1875), 1 Ch. D. 409, C. A.

(*e*) *Hill* v. *Midland Rail. Co.*, *supra*, *per* FRY, J., at p. 147; *Ramsden* v. *Manchester South Junction and Altrincham Rail. Co.* (1884), 1 Exch. 723; *Pinchin* v. *London and Blackwall Rail. Co.*, *supra*.

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 3.

(*g*) *Ibid.*, s. 1.

(*h*) *Ibid.*, s. 5.

(*i*) *R.* v. *London Corporation* (1867), L. R. 2 Q. B. 292, *per* BLACKBURN, J., at p. 295, in delivering the judgment of the court. For applications of the rule, see *Ex parte Rayner* (1878), 3 Q. B. D. 446; *Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425.

(*k*) *Metropolitan District Rail. Co.* v. *Sharpe*, *supra*, *per* Lord BLACKBURN, at p. 441.

(*l*) *Re Westminster Estate of St. Sepulchre (Parish), Ex parte St. Sepulchre (Vicar)* (1864), 4 De G. J. & Sm. 232; *R.* v. *St. Luke's, Chelsea, Vestry* (1871), L. R. 7 Q. B. 148, Ex. Ch., and cases cited in note (*i*), *supra*.

SECT. 2. By the Lands Clauses Acts.

must be given to the words of the special Act (*m*), but slight variations may not be material (*n*). The effect to be given to these introductory headings in construing the sections that are ranged under them is not governed by any general rule. They may be referred to in order to determine the sense of any doubtful expression in a section (*o*).

SUB-SECT. 3.—*Conditions as to Land Tax and Poor Rate.*

Land tax and poor rate.

14. Besides the provisions in the Lands Clauses Acts regulating compulsory purchase and the payment of compensation, there is a further provision that, if promoters of the undertaking become possessed by virtue of the special or any incorporated Act of any lands charged with land tax or liable to be assessed to the poor's rate, they will from time to time, until the works are completed and assessed to such land tax and poor's rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate by reason of the lands having been taken or used for the purposes of the works (*p*). If the Lands Clauses Acts are incorporated without this provision being excepted, all promoters of undertakings, including public bodies and local authorities, incur this liability, even in respect of land acquired for carrying out public improvements (*q*), or for the purposes of Parts I. and III. of the Housing of the Working Classes Act, 1890 (*r*). The liability extends to all land acquired under the special Act, whether actually used for the undertaking or not (*s*), provided the land was in fact assessed (*t*).

Deficiency to be made good.

How computed.

The deficiency is to be computed according to the rental at which the lands, with any building thereon, were valued or rated at the time of the passing of the special Act (*a*), but this does not mean that the promoters are liable to be rated in respect of such land upon the value of the land at the passing of the special Act. If the land is not beneficially occupied by the promoters, they will

(*m*) *Broadbent* v. *Imperial Gas Light Co.* (1857), 7 De G. M. & G. 436, *per* Lord CRANWORTH, at p. 447; *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437, C. A.

(*n*) *R.* v. *London Corporation* (1867), L. R. 2 Q. B. 292.

(*o*) *Hammersmith and City Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171, *per* Lord CHELMSFORD, at p. 203; *Eastern Counties Rail. Co.* v. *Marriage* (1860), 9 H. L. Cas. 32; and compare *Bryan* v. *Child* (1850), 5 Exch. 368; *Latham* v. *Lafone* (1867), L. R. 2 Exch. 115, at p. 123; *Lang* v. *Kerr, Anderson & Co.* (1878), 3 App. Cas. 529, at p. 536; *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365, decided under other statutes.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 133.

(*q*) *London Corporation* v. *St. Andrew's, Holborn, Churchwardens* (1867), L. R. 2 C. P. 574; *Wheeler* v. *Metropolitan Board of Works* (1869), L. R. 4 Exch. 303; *Stratton* v. *Metropolitan Board of Works* (1874), L. R. 10 C. P. 76; *Bristol (Governor of Poor of)* v. *Bristol Corporation* (1887), 18 Q. B. D. 549, C. A.; *Islington Borough Council* v. *London School Board*, [1903] 2 K. B. 354, C. A.

(*r*) 53 & 54 Vict. c. 70; *St. Leonard, Shoreditch, Vestry* v. *London County Council*, [1895] 2 Q. B. 104. And see title PUBLIC HEALTH.

(*s*) *Putney Overseers* v. *London and South Western Rail. Co.*, [1891] 1 Q. B. 440, C. A.

(*t*) *Stratton* v. *Metropolitan Board of Works* (1874), L. R. 10 C. P. 76; *St. Stephen, City of London, Churchwardens* v. *Great Northern and City Rail. Co.* (1902), 86 L. T. 390.

(*a*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 133.

not be liable to be rated (*b*), but they will be liable to make good the deficiency caused by their operations, whether there is beneficial occupation by them or not. In order to ascertain the deficiency, the assessment which existed at the time of the passing of the special Act in respect of the lands taken must be compared with the subsequent assessment at the time when it is sought to ascertain the deficiency (*c*). It is the amount at which the land was assessed, not the amount paid, which is material (*d*).

Meaning of poor's rate.

Under the term "poor's rate" is included not only the poor rate, but also such rates as are charged upon or made payable out of it (*e*), such as the borough rate (*f*) and the county rate (*g*), but rates assessed and levied as one rate with the poor rate are not included (*h*). In some special Acts the provision has been extended to include all the general rates (*i*).

Cesser of liability.

The deficiency, and therefore the liability, may disappear before the works are completed, by reason of the lands or buildings erected becoming assessable to an amount equal to or in excess of the value at the time of the passing of the special Act; but if the use made of the land is such that there is a permanent deficiency, as in the case of public improvements, the liability to make good the deficiency will cease when the particular works are completed and such parts as become assessable are assessed (*k*). If the undertaking extends into several parishes, as in the case of a railway, the liability in respect of the poor's rate of each parish will terminate with the completion and assessment of the works in that particular parish (*l*); and if there are several undertakings authorised by one Act, the liability will determine as regards each undertaking when it is completed and assessed (*m*). The means of ascertaining the completion may be fixed by the special Act (*n*); but if not, it will depend

(*b*) *London Corporation* v. *St. Andrew's, Holborn, Churchwardens* (1867), L. R. 2 C. P. 574.

(*c*) *Putney Overseers* v. *London and South Western Rail. Co.*, [1891] 1 Q. B. 440, *per* Lord ESHER, at p. 442, C. A.

(*d*) Thus, in the last-cited case it was held that the fact that some of the houses were unlet at the date of the special Act was immaterial in estimating the deficiency. It is also immaterial that the owners may have been allowed a deduction of 25 per cent. on agreeing to pay the rate instead of the occupier (*St. Leonard, Shoreditch, Vestry* v. *London County Council*, [1895] 2 Q. B. 104).

(*e*) *Farmer* v. *London and North Western Rail. Co.* (1888), 20 Q. B. D. 788.

(*f*) Under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 145.

(*g*) Under the County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 26.

(*h*) *Islington Borough Council* v. *London School Board*, [1903] 2 K. B. 354, C. A.

(*i*) See *Burrup* v. *London and South Western Rail. Co.* (1890), 64 L. T. 112; *St. Stephen, City of London, Churchwardens* v. *Great Northern and City Rail. Co.* (1902), 86 L. T. 390.

(*k*) *East London Rail. Co.* v. *Whitechurch* (1874), L. R. 7 H. L. 81, *per* Lord CHELMSFORD, at pp. 92, 93; and see *Wheeler* v. *Metropolitan Board of Works* (1869), L. R. 4 Exch. 303; *Bristol (Governor of Poor of)* v. *Bristol Corporation* (1887), 18 Q. B. D. 549, C. A., *per* Lord ESHER, M.R., at pp. 561, 562.

(*l*) *East London Rail. Co.* v. *Whitechurch*, *supra*, a case decided upon a similar provision in a special Act, overruling *R.* v. *Metropolitan District Rail. Co.* (1871), L. R. 6 Q. B. 698.

(*m*) *Bristol (Governor of Poor of)* v. *Bristol Corporation* (1887), 18 Q. B. D. 549, C. A.

(*n*) *Stratton* v. *Metropolitan Board of Works* (1874), L. R. 10 C. P. 76.

SECT. 2. By the Lands Clauses Acts.

on the actual completion of the work, and on the sale or lease of the last piece of land acquired but not used for the undertaking (*o*).

When payment to be made.

The deficiency is payable to the collector of the said assessments respectively on demand (*p*). It should be computed from time to time as the rates are made (*q*), but it need not be demanded at the times the other rates are collected. It is not payable until demanded, but delay in demanding payment will not extinguish the liability so as to prevent arrears being recovered (*r*). It is recoverable by action (*s*).

Redemption of land tax.

15. Instead of making good the deficiency in the land tax, the promoters may redeem it at any time they think fit, in accordance with the Acts providing for the redemption of the land tax (*a*).

SUB-SECT. 4.—*Access to Special Act.*

Access to special Act.

16. The Lands Clauses Consolidation Act, 1845, also contains provisions enabling all persons interested in the special Act to have access to it (*b*). For this purpose a company (*c*) is required, at all times after the expiration of six months from the passing of the Act, to keep a copy of it, printed by the King's Printers, in their principal office of business, and where the undertaking is such that the works are not confined to one town or place, as in the case of a railway or canal, the company is also required, within

Deposit of Act with clerk of the peace.

such six months, to deposit in the office of each of the clerks of the peace of the several counties into which the works extend, a like copy of the special Act. Failure on the part of the company to keep or deposit the copies of the Act renders them liable to forfeit £20 for every such offence, and also £5 for every day afterwards during which such copy shall not be so kept and deposited (*d*).

Inspection.

The clerks of the peace are required to receive and retain these copies, and they and the company must permit all persons interested to inspect the Act, and make extracts or copies therefrom, at all reasonable hours of the day, and for a reasonable time, on payment to the clerk of the peace of one shilling for every such inspection of the deposited copy, and the further sum of one shilling for every hour during which such inspection shall continue after the first hour, and after the rate of sixpence for every hundred words copied therefrom (*e*).

(*o*) *Bristol* (*Governor of Poor of*) v. *Bristol Corporation* (1887), 18 Q. B. D. 549, C. A.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 133.

(*q*) *Stratton* v. *Metropolitan Board of Works* (1874), L. R. 10 C. P. 76, *per* DENMAN, J., at p. 88; *Bristol* (*Governor of Poor of*) v. *Bristol Corporation*, *supra*.

(*r*) *Stratton* v. *Metropolitan Board of Works*, *supra*.

(*s*) *Ibid.*, and other cases cited in notes to this sub-section; and see, generally, title RATES AND RATING.

(*a*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 133; and see title LAND TAX.

(*b*) *Ibid.*, ss. 150, 151.

(*c*) The word "company" is used in these sections, and not "promoters of undertaking," as in other sections. These sections are not incorporated in provisional orders confirmed by Parliament, as the confirming Act is a public general Act.

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 151.

(*e*) *Ibid.*, s. 150, and s. 2 of the Parliamentary Documents Deposit Act, 1837

For every omission to comply with the provisions of the Act clerks of the peace are liable to a penalty not exceeding £5, which is recoverable before a court of summary jurisdiction (*f*).

SECT. 3.—*Conditions under other Acts.*

SUB-SECT. 1.—*Commons.*

Commons.

17. For the purpose of restricting the inclosure of commons and town or village greens, grants or inclosures thereof under Acts incorporating the Lands Clauses Consolidation Act, 1845 (*g*), or under the Church Building Act, 1818 (*h*), are invalid (*i*) unless specially authorised by Act of Parliament (*k*), or made to or by any Government department, or made with the consent of the Board of Agriculture and Fisheries (*l*).

SUB-SECT. 2.—*Tithes.*

Tithes.

18. If land which is charged with a corn rent, rent-charge, or money payment in lieu of tithe, is taken for certain purposes, the persons proposing to apply the land to these purposes are required, as soon as they are in possession of the land and before the land is so dealt with, to apply to the Board of Agriculture and Fisheries to order the redemption of the charge for a sum of money equal to twenty-five times the amount thereof. The amount is to be paid to the said Board within a time to be fixed in the said order or within such enlarged time as the Board may appoint (*m*).

(7 Will. 4 & 1 Vict. c. 83), which is referred to in s. 150. See s. 3 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), for a definition of the expression "clerk of the peace." In counties the clerk of the peace became the clerk of the county council under s. 83 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), and sub-s. (6) thereof provides that all enactments relating to deposit shall be construed as if the clerk of the county council were therein substituted for the clerk of the peace.

(*f*) Parliamentary Documents Deposit Act, 1837 (7 Will. 4 & 1 Vict. c. 83), s. 3.

(*g*) 8 & 9 Vict. c. 18.

(*h*) 58 Geo. 3, c. 45.

(*i*) Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22 (1). And see title COMMONS, Vol. IV., p. 441.

(*k*) It is now usual in local and personal Acts to insert a provision that other land shall be substituted for common land authorised to be taken.

(*l*) The Board of Agriculture and Fisheries in giving or withholding their consent are governed in their discretion and procedure by the Commons Act, 1876 (39 & 40 Vict. c. 56), in relation to applications under the Inclosures Acts (Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22 (2)). See title COMMONS, Vol. IV., p. 441, and for forms relating to the compulsory acquisition of common rights, see Encyclopædia of Forms, Vol. VIII., pp. 114 to 125.

(*m*) Tithe Act, 1878 (41 & 42 Vict. c. 42), s. 1, as amended by the Tithe Rent-charge Act, 1885 (48 & 49 Vict. c. 32), s. 2. The purposes above referred to are the building of any church, chapel, or other place of public worship; the making of any cemetery or other place of burial; the erection of any school under the Elementary Education Acts; the erection of any town hall, court of assize, gaol, lunatic asylum, hospital, or any other building used for public purposes, or in carrying out any improvements under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part I.; the formation of any sewage farm under the provisions of the Sanitary Acts, or the construction of any sewers or sewage or any gas or water works; or the enlarging and

Conditions under other Acts.

Housing of the working classes.

19. When promoters of undertakings have statutory power to take in the administrative county of London, or in any borough or urban district, or in any parish not within a borough or urban district, working men's dwellings occupied by thirty or more persons belonging to the working class, they cannot enter on any such dwellings until the Local Government Board have either approved of a scheme for the rehousing of such number of persons of the working class as is in their opinion required, or have determined that such a scheme is unnecessary (*n*). This condition attaches to all powers authorising the acquisition of land, whether compulsorily or by agreement, given after 14th August, 1903 (*o*), under any local Act, provisional order, or order having the effect of an Act, and to cases where after that date any land is acquired compulsorily under any general Act other than the Housing of the Working Classes Acts, and it applies to any authority, company, or person having such powers (*p*).

Definitions.

For the purposes of this restriction a house is to be considered a working man's dwelling if it is wholly or partially occupied by a person belonging to the working classes (*q*). The

Dwelling or house.

expression "dwelling" or "house" is defined as meaning any house or part of a house occupied as a separate dwelling (*r*), while the

Working class.

expression "working class" includes mechanics, artisans, labourers, and others working for wages; hawkers, costermongers, and persons not working for wages, but working at some trade or handicraft without employing others, except members of their own family; and persons, other than domestic servants, whose income in any case does not exceed an average of thirty shillings a week, and the families of any such persons who may be residing with them (*s*).

For the purpose of determining whether a house is a working man's dwelling or not, and also for determining the number of persons belonging to the working classes by whom any dwelling-houses are occupied, consideration is to be taken of any occupation on or after the 15th day of December next before the passing of the Act or order under which the land is acquired, or, in the case of land acquired compulsorily under a general Act without the authority of an order, next before the date of the application to the Local Government Board for a housing scheme (*t*).

Rehousing scheme.

20. The procedure of the Local Government Board in approving a scheme (*a*), the matters to be considered by the Board in so

improving of the premises or buildings occupied or used for any of the above-mentioned purposes. As to tithes, generally, see title ECCLESIASTICAL LAW.

(*n*) Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 3 and Schedule.

(*o*) Date of passing of last-mentioned Act.

(*p*) Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), Sched. (1), (12) (a).

(*q*) *Ibid.*, Sched. (1).

(*r*) *Ibid.*, Sched. (12) (d).

(*s*) *Ibid.*, Sched. (12) (e). For housing of the working classes, generally, see title PUBLIC HEALTH.

(*t*) *Ibid.*, Sched (1).

(*a*) *Ibid.*, Sched. (5), (7), (8).

SECT. 3. Conditions under other Acts.

doing (*b*), the conditions which may be imposed (*c*), the enforcing of the scheme (*d*), and the provisions which may be inserted in the scheme are regulated by statute (*e*). Among the provisions which may be inserted is one giving undertakers who are a local authority, or who have not sufficient power for the purpose, power to appropriate or to acquire land either by agreement or compulsorily under the authority of a provisional order in order to carry out the housing scheme, and local authorities may also be given certain powers of building (*f*). A condition that must be inserted in the scheme is that any lands acquired under it shall for a period of twenty-five years from the date of the scheme be appropriated for the purpose of dwellings for persons of the working class, except in so far as the Local Government Board dispense with that appropriation, and any conveyance, demise, or lease of any such land must be indorsed with notice of this provision (*g*). Housing schemes may be subsequently modified by the Local Government Board on the application of the undertakers (*h*).

SECT. 4.—*Restrictions as to Land to be taken.*

SUB-SECT. 1.—*In General.*

What land may be taken.

21. Promoters of an undertaking cannot take or interfere with any particular piece of land unless it is clear from their special Act that they are authorised to do so. It is the policy of Parliament, particularly in regard to commercial undertakings, also to limit the quantity of land which may be taken to such an amount as is reasonably necessary for the purposes of the particular undertaking (*i*). Many special Acts give the promoters of undertakings compulsory powers of purchase over a large area, but provide that only so much of that land may be taken as shall be actually required. In the case of railways, for example, it is usual to allow certain limits within which the line may be constructed. Under the Standing Orders of Parliament these limits, called limits of deviation, are shown on the deposited plans, and all lands included within these limits must be marked thereon (*k*). These limits represent the distance which the centre line of the railway may be deviated, but do not indicate the outside limits of the railway (*l*). The special Act gives power to take land so that the centre line of the railway may be constructed anywhere between these limits, but only so much of the land as is necessary for the purpose.

(*b*) Housing of the Working Clauses Act, 1903 (3 Edw. 7, c. 39), Sched. (2).
(*c*) *Ibid.*, Sched. (4), (6).
(*d*) *Ibid.*, Sched. (7), (9), (10).
(*e*) *Ibid.*, Sched. (2), (3), (4). See title PUBLIC HEALTH ETC.
(*f*) *Ibid.*, Sched. (3).
(*g*) *Ibid.*, Sched. (4).
(*h*) *Ibid.*, Sched. (11).
(*i*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 18.
(*k*) Standing Orders of the Houses of Parliament, No. 40.
(*l*) The ordinary mode of showing the limits of deviation is to make a dark line along what is proposed to be the centre of the railway, and then to make dotted lines outside which mark the limits of deviation (*Finck* v. *London and South Western Rail. Co.* (1890), 44 Ch. D. 330, *per* KAY, J., at p. 337, C. A.); and see title RAILWAYS AND CANALS.

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Sometimes promoters of undertakings acquire more land than they actually require, in which case Parliament, in pursuance of the same policy, provides that such superfluous land must be sold within a prescribed period (*m*).

SUB-SECT. 2.—*Land authorised to be taken.*

Land authorised to be taken.

22. Special Acts commonly authorise land to be taken by providing that for the purposes of the Act the promoters of the undertaking may enter upon, take, and use the lands delineated and described in the deposited plans and books of reference or any of them (*n*). The power so granted will not authorise the promoters to compel landowners to grant them merely easements over their land, although, for example, a right of way might be sufficient for the purpose (*o*), nor will it enable them to take a stratum of land or to appropriate and use the subsoil, as for the purpose of making a tunnel (*p*). Unless special provision is made for such cases, the entire land must be purchased, except when the owner is willing to agree otherwise (*q*).

Deposited plans etc.

23. The plans and books of reference are only binding to the extent to which they are incorporated and referred to in the special Act, and only for the purpose in regard to which that Act refers to them (*r*). Representations on the plans as to the position, extent, or nature of the works proposed to be constructed are not obligatory on the promoters unless such representations are incorporated in the Act, although the effect of such representations may have prevented the landowner from opposing the Bill when before Parliament (*s*). In

(*m*) See p. 26, *post*.

(*n*) See p. 8, *ante*.

(*o*) *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 5 De G. M. & G. 851, *per* Lord CRANWORTH, at p. 862; *Re Metropolitan District Rail. Co. and Cosh* (1880), 13 Ch. D. 607, *per* JESSEL, M.R., at p. 616, C. A.; *Re London School Board and Foster* (1903), 87 L. T. 700, C. A.

(*p*) *Ramsden* v. *Manchester South Junction and Altrincham Rail. Co.* (1848), 1 Exch. 723; *Sparrow* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1852), 2 De G. M. & G. 94, *per* Lord CRANWORTH, at p. 108; and see *Falkner* v. *Somerset and Dorset Rail. Co.* (1873), L. R. 16 Eq. 458. Power to appropriate and use subsoil is equivalent to power to take (*Metropolitan Rail. Co.* v. *Fowler*, [1893] A. C. 416, *per* Lord WATSON, at p. 426).

(*q*) *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, *per* Lord WATSON, at pp. 800, 801. Persons under disability are commonly authorised by the special Act to sell easements, rights, and privileges by agreement. See Model Bills and Clauses. In many cases promoters are authorised to purchase easements, and to appropriate and use the subsoil of land, as for tube railways. See *Farmer* v. *Waterloo and City Rail. Co.*, [1895] 1 Ch. 527. Sewers and pipes may often be laid in land under statutory powers without it being necessary to buy the land (*Thornton* v. *Nutter* (1867), 31 J. P. 419; *Roderick* v. *Aston Local Board* (1877), 5 Ch. D. 328, C. A.; and see p. 65, *post*). In purchasing land promoters are also in many cases freed from the necessity of purchasing the minerals. See p. 50, *post*.

(*r*) *North British Rail. Co.* v. *Tod* (1846), 12 Cl. & Fin. 722, H. L.; *Beardmer* v. *London and North Western Rail. Co.* (1849), 1 Mac. & G. 112, *per* Lord COTTENHAM, at p. 114.

(*s*) Case cited in last note, and *Breynton* v. *London and North Western Rail. Co.* (1846), 10 Beav. 238; *R.* v. *Caledonian Rail. Co.* (1850), 16 Q. B. 19; *Ware*

SECT. 4. Restrictions as to Land to be taken.

the same way notices given before the promotion of the Bill as to the extent of land proposed to be taken will not prevent the promoters from taking a greater quantity if the Act in fact authorises it (*t*). Conversely, promoters cannot execute works shown on the deposited plans unless power to do so is expressly given in the special Act (*a*).

Limits of deviation.

24. Before the promoters can take land under a clause in the above form, it must appear that the land in question is delineated on the plans. Land within the limits of deviation is considered to be delineated, although all the outside boundaries may not be shown (*b*). Land partly within and partly without these limits may be held not to be delineated if some only of its boundaries are shown. In disputes of this nature the question turns upon whether the landowner upon looking at the plans can reasonably be deemed to have had notice that his land might be required, and the answer in each particular case will depend on the size and nature of the particular close of land and the extent to which the boundaries are indicated (*c*). Land outside the limits of deviation may, of course, be taken if properly delineated and required (*d*).

SUB-SECT. 3.—*Land required for the Purposes of the Undertaking.*

Purposes for which land may be taken.

25. The Act which confers the power of taking land must be looked to in order to ascertain the purposes for which the land may be taken (*e*). These purposes may include the execution of works, in which case land may be taken for all the works, of whatsoever nature, authorised to be executed (*f*). If the purpose is clearly one within the meaning of the Act, the promoters will be justified in taking land for that purpose, even although the object might be

v. *Regent's Canal Co.* (1858), 3 De G. & J. 212; *A.-G.* v. *Great Eastern Rail. Co.* (1872), 7 Ch. App. 475.

(*t*) *Re Huddersfield Corporation and Jacomb* (1874), 10 Ch. App. 92. The accidental omission of the names of persons interested in land from the book of reference will not prevent the land from being taken (*Kemp* v. *West End of London and Crystal Palace Co.* (1855), 1 K. & J. 681). Mistakes and omissions in plans and books of reference are usually allowed to be corrected by reason of a clause to that effect in an incorporated Act, *e.g.*, Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 7; Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 7.

(*a*) *A.-G.* v. *Great Northern Rail. Co.* (1850), 4 De G. & Sm. 75; *R.* v. *Wycombe Rail. Co.* (1867), L. R. 2 Q. B. 310, *per* COCKBURN, C.J., at p. 319.

(*b*) *Wrigley* v. *Lancashire and Yorkshire Rail. Co.* (1863), 9 Jur. (N. S.) 710; *Dowling* v. *Pontypool, Caerleon, and Newport Rail. Co.* (1874), L. R. 18 Eq. 714.

(*c*) See cases cited in last note, and *Finck* v. *London and South Western Rail. Co.* (1890), 44 Ch. D. 330, C. A.; *Protheroe* v. *Tottenham and Forest Gate Rail. Co.*, [1891] 3 Ch. 278, C. A.; *Coats* v. *Caledonian Rail. Co.* (1905), 6 F. 1642.

(*d*) *Crawford* v. *Chester and Holyhead Rail. Co.* (1847), 11 Jur. 917; *Finck* v. *London and South Western Rail. Co.* (1890), 44 Ch. D. 330, C. A.

(*e*) *Simpson* v. *South Staffordshire Waterworks Co.* (1865), 34 L. J. (CH.) 380, *per* Lord WESTBURY, at p. 387.

(*f*) See definition of "undertaking" and "works" in Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 2, p. 14, *ante*. Thus, in the case of a railway these would ordinarily include not only the line itself, but also stations, warehouses, offices, yards, and other conveniences (*Cother* v. *Midland Rail. Co.* (1848), 5 Ry. & Can. Cas. 187, *per* Lord COTTENHAM, at pp. 193, 194; *Sadd* v. *Maldon, Witham and Braintree Rail. Co.* (1851), 6 Exch. 143), and in the case of a dock

SECT. 4. Restrictions as to Land to be taken.

obtained in some other way (*g*). Companies formed for profit must show clearly and distinctly from the Act the existence of the power they claim to exercise. If there is any doubt in the matter, the Act will be construed in favour of the landowner (*h*), but in the case of local authorities carrying out public improvements the interest of the public as well as of the landowner will be considered in construing a doubtful provision (*i*). All promoters, however, whether local authorities or companies formed for trade, can take land only for those purposes for which the Legislature has invested them with the power. If they attempt to take it for any collateral object, the court will restrain them by injunction (*k*).

If the purposes for which the land is required are legitimate, the promoters of the undertaking are the persons to determine which portion of the land is required (*l*). It is immaterial that the

there would be included quays, wharves, and warehouses (*London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 240, *per* LINDLEY, L.J., at pp. 249, 250, C. A.).

(*g*) *Lamb* v. *North London Rail. Co.* (1869), 4 Ch. App. 522.

(*h*) *Webb* v. *Manchester and Leeds Rail. Co.* (1839), 4 My. & Cr. 116, *per* Lord COTTENHAM, at p. 120; *Lee* v. *Milner* (1837), 2 Y. & C. (EX.) 611; *Gray* v. *Liverpool and Bury Rail. Co.* (1846), 9 Beav. 391; *Re London and Birmingham Rail. Co.'s Act* (1833) *and Re London and North Western Rail. Co.'s Act* (1846), *Ex parte Eton College* (1850), 20 L. J. (CH.) 1; *Simpson* v. *South Staffordshire Waterworks* (1865), 34 L. J. (CH.) 380; *Cardiff Corporation* v. *Cardiff Waterworks Co.* (1859), 5 Jur. (N. S.) 953; and see *Geldart* v. *Gladstone* (1809), 11 East, 675; *Scales* v. *Pickering* (1828), 4 Bing. 448. The court, however, will not allow persons to avail themselves of omissions in powers in order to make exorbitant claims (*Bell* v. *Hull and Selby Rail. Co.* (1840), 1 Ry. & Can. Cas. 616).

(*i*) *Galloway* v. *London Corporation* (1866), L. R. 1 H. L. 34; *Quinton* v. *Bristol Corporation* (1874), L. R. 17 Eq. 524; *Rolls* v. *London School Board* (1884), 27 Ch. D. 639; *North London Rail. Co.* v. *Metropolitan Board of Works* (1859), 28 L. J. (CH.) 909; *Batson* v. *London School Board* (1903), 67 J. P. 457.

(*k*) *Galloway* v. *London Corporation*, *supra*, *per* Lord CRANWORTH, at p. 43, and other cases cited in last note. Thus, a railway company having the ordinary powers of constructing a railway will be restrained from taking land in order to obtain materials wherewith to make an embankment (*Bentinck* v. *Norfolk Estuary Co.* (1857), 26 L. J. (CH.) 404; *Eversfield* v. *Mid Sussex Rail. Co.* (1858), 3 De G. & J. 286; *Lund* v. *Midland Rail. Co.* (1865), 34 L. J. (CH.) 276), or in order to carry out an agreement with a landowner (*Vane* v. *Cockermouth, Keswick and Penrith Rail. Co.* (1865), 13 W. R. 1015; *Carington* (*Lord*) v. *Wycombe Rail. Co.* (1868), 3 Ch. App. 377). But they may take land in order to make accommodation works for adjoining owners and occupiers, as such works are required to be made (Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68), *Wilkinson* v. *Hull etc. Rail. and Dock Co.* (1882), 20 Ch. D. 323, C. A.; *Beauchamp* (*Lord*) v. *Great Western Rail. Co.* (1868), 3 Ch. App. 745; and compare *Dodd* v. *Salisbury and Yeovil Rail. Co.* (1859), 1 Giff. 158). When a field is authorised to be taken by a water company in order to make a tunnel, and only part is required, the company cannot take the whole field and use the remainder for sinking wells and erecting pumping machinery (*Simpson* v. *South Staffordshire Waterworks Co.*, *supra*; *Cardiff Corporation* v. *Cardiff Waterworks Co.*, *supra*). Local authorities authorised to take land to widen a street cannot under that power take land merely to alter the level of the street (*Lynch* v. *Commissioners of Sewers of City of London* (1886), 32 Ch. D. 72, C. A.), nor can they take it for purposes of resale unless power is given to them by the special Act (*Gard* v. *Commissioners of Sewers of City of London* (1885), 28 Ch. D. 486, C. A.); and see sub-sect. 4, p. 25, *post*.

(*l*) *Stockton and Darlington Rail. Co.* v. *Brown* (1860), 9 H. L. Cas. 246; *Webb* v. *Manchester and Leeds Rail. Co.* (1839), 4 My. & Cr. 116.

works might be carried out in another way which might cause less inconvenience (*m*). In coming to a determination they must act honestly and in good faith with a view to using the land for the authorised purpose, and not for any sinister or collateral purpose (*n*). The same principles are applicable when undertakers are authorised to interfere with lands, as, for example, in laying sewers or water mains (*o*).

SUB-SECT. 4.—*Land taken for Recoupment and Exchange.*

Recoupment.

26. Municipal and other public bodies are sometimes given powers to take land beyond that which is necessary for the actual execution of the proposed works, in order that some part at least of the improved value of the adjoining lands may be secured in ease of the burden upon the ratepayers. These lands are said to be authorised to be taken for the purpose of "recoupment," as the public body is empowered to sell or lease them at what may be an enhanced value (*p*).

Exchange of land.

Similarly, public bodies may be allowed to acquire land which they may exchange for other land in order to carry out the intended object more effectually or economically (*q*).

Restriction on power.

If the Act clearly authorises the land to be taken for the actual works only, a local authority or other public body will be restrained from taking more than is actually necessary for such works (*r*), but if it appears that it is the intention of the Act that the public body are to be allowed to reimburse themselves; they will then be at liberty to take all the lands delineated on the plans (*p*). On the other hand, when local authorities are authorised to take lands from time to time for specific works, such as street widening, and the land is not specified in the Act, they cannot, in order by resale to reduce the expense to the ratepayers, take more than is *bonâ fide* necessary for the purpose (*s*).

SUB-SECT. 5.—*Land for Extraordinary Purposes.*

Extra-ordinary purposes.

27. Promoters of particular classes of undertakings, such as railways, are also authorised to purchase land for what are called

(*m*) See cases cited in note (*l*), on p. 24, *ante*, and *London, Brighton, and South Coast Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; *R.* v. *Pease* (1832), 4 B. & Ad. 30; *Lamb* v. *North London Rail. Co.* (1869), 4 Ch. App. 522.

(*n*) See cases cited in note (*l*), on p. 24, *ante*, and *Flower* v. *London, Brighton, and South Coast Rail. Co.* (1865), 34 L. J. (CH.) 540; *Kemp* v. *South Eastern Rail. Co.* (1872), 7 Ch. App. 364; *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559, C. A. See those cases also as to the evidence necessary. If the purpose is apparently legitimate, the burden of proving the contrary will lie upon the landowner.

(*o*) *Derby (Earl)* v. *Bury Improvement Commissioners* (1869), L. R. 4 Exch. 222, Ex. Ch., *per* WILLES, J., at p. 225; *Lewis* v. *Weston-super-Mare Local Board* (1888), 40 Ch. D. 55.

(*p*) *Galloway* v. *London Corporation* (1866), L. R. 1 H. L. 34; *Quinton* v. *Bristol Corporation* (1874), L. R. 17 Eq. 524.

(*q*) *Rolls* v. *London School Board* (1884), 27 Ch. D. 639.

(*r*) *Donaldson* v. *South Shields Corporation* (1899), 79 L. T. 685, C. A.

(*s*) *J. L. Denman & Co., Ltd.* v. *Westminster Corporation; J. C. Cording & Co., Ltd.* v. *Westminster Corporation*, [1906] 1 Ch. 464; *Fernley* v. *Limehouse Board of Works* (1899), 68 L. J. (CH.) 344.

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extraordinary purposes, which seem to be purposes for which it was not foreseen at the time of the passing of the special Act that land would, of necessity, be required (*t*). Land for such purposes can only be acquired by agreement, and the quantity of such land as well as the purposes for which it may be purchased are generally specified in the special Act (*a*). Promoters may sell the land so acquired and purchase other land for the like purposes, and, so long as the amount held does not exceed the prescribed quantity, they may deal with such land as an ordinary proprietor may do (*b*). In the absence of provision to the contrary, promoters may carry on the authorised undertaking upon such lands even although their doing so may be a nuisance and cause injury to adjoining owners (*c*). Land acquired for extraordinary purposes is not subject to the provisions relating to superfluous land (*d*).

SUB-SECT. 6.—*Sale of Superfluous Lands.*

Superfluous lands.

28. In the Lands Clauses Consolidation Act, 1845, are a series of sections with respect to what are called superfluous lands (*e*). These are lands acquired under the provisions of the special Act either compulsorily or by negotiations undertaken by virtue of the compulsory powers, which lands are subsequently found not to be required for the purposes of the undertaking (*f*). These sections will be deemed to be incorporated unless expressly or impliedly excluded (*g*).

(*t*) *Hooper* v. *Bourne* (1877), 3 Q. B. D. 258, *per* BRAMWELL, L.J., at p. 272, C. A.

(*a*) See Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 45; Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 9; Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 20. As to the purchase of such land, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 12, and p. 56, *post*. It may be land included within the limits of deviation (*Hooper* v. *Bourne*, *supra*). Covenants restricting the use of such land are void (*Re South Eastern Rail. Co. and Wiffin's Contract*, [1907] 2 Ch. 366).

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 13; and *City of Glasgow Union Rail. Co.* v. *Caledonian Rail. Co.* (1871), L. R. 2 Sc. & Div. 160, *per* Lord WESTBURY, at p. 165.

(*c*) *London, Brighton, and South Coast Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; and compare *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193. Since 1885 a provision is usually inserted in Acts authorising the purchase of land for extraordinary purposes that the undertakers shall not be exempt from proceedings for nuisance caused or permitted by them upon such land. See Model Bills and Clauses.

(*d*) *City of Glasgow Union Rail. Co.* v. *Caledonian Rail. Co.*, *supra*; *Hooper* v. *Bourne*, *supra*. As to superfluous lands, see next sub-section, *infra*. For form of assignment of leasehold house required for extraordinary purposes, see Encyclopædia of Forms, Vol. VIII., p. 110.

(*e*) 8 & 9 Vict. c. 18, ss. 127—132.

(*f*) See heading to this group of sections, and *Great Western Rail. Co.* v. *May* (1874), L. R. 7 H. L. 283, *per* Lord CAIRNS, L.C., at p. 292; *Hooper* v. *Bourne*, *supra*, *per* BRAMWELL, L.J., at p. 272, C. A.

(*g*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 1; and see p. 13, *ante*. S. 127 is expressly excluded by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 176 (see modification in Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53)), and by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65. For an example of implied exclusion, see *Tomlin* v. *Budd* (1874), L. R. 18 Eq. 368.

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Their object is to secure to the landowners from whom land is taken by compulsion a reverting, as nearly as the Legislature can accomplish it, of all land which is not required for the undertaking (*h*). When incorporated, the sections apply to all lands acquired directly or indirectly under compulsory powers, but they do not apply to lands bought under mere powers of purchase by agreement (*i*), among which are included lands bought for extraordinary purposes (*k*), nor are they applicable to cases where the lands cease to be required because of the partial or total abandonment of the undertaking (*l*).

Reasons for superfluity.

Lands become superfluous from various causes. Thus, the undertakers may make a wrong estimate of the quantity of land required for a purpose for which it is afterwards found out by experience that less land than was originally supposed will be sufficient, or the undertakers may have been forced to take more land than they require, as when they are compelled to take the whole of certain premises when part would have been sufficient (*m*). A third case would be where the land was required and taken originally for works intended to be permanent, but which were afterwards found to be unnecessary and abandoned; and a fourth case, where the undertakers acquired land for a temporary purpose, which purpose has come to an end (*n*). It may, of course, happen that land which is not required for the particular purpose of an undertaking for which it was in fact acquired, may be required and used for some other purpose of the same undertaking, in which case it will not be deemed superfluous (*o*).

Time for sale.

29. The promoters of the undertaking are required to sell and dispose of all their superfluous lands within the period prescribed by the special Act, and if no period is prescribed, then within ten years after the expiration of the time limited in the special Act for the completion of the works (*p*). They may sell at any time they consider the land superfluous. The sale must be absolute, and the promoters may not retain any interest in the land. Thus, a covenant for repurchase of the land would render the sale void as regards that portion (*q*), but promoters have the rights of ordinary

Conditions of sale.

(*h*) *Great Western Rail. Co.* v. *May* (1874), L. R. 7 H. L. 283, *per* Lord CAIRNS, L.C., at p. 295.

(*i*) *Horne* v. *Lymington Rail. Co.* (1874), 31 L. T. 167.

(*k*) *City of Glasgow Union Rail. Co.* v. *Caledonian Rail. Co.* (1871), L. R. 2 Sc. & Div. 160; *Hooper* v. *Bourne* (1877), 3 Q. B. D. 258, C. A.; and see sub-sect. 5, p. 26, *ante*.

(*l*) *Astley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1858), 27 L. J. (CH.) 478; *Smith* v. *Smith* (1868), L. R. 3 Exch. 282; *Re Duffy*, [1897] 1 I. R. 307, C. A. In case of abandonment the Act authorising the abandonment usually makes provision as to the disposal of the land.

(*m*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92; and see also s. 93.

(*n*) See *Great Western Rail. Co.* v. *May*, *supra*, *per* Lord CAIRNS, L.C., at pp. 292, 293.

(*o*) Thus, land taken for the construction of a railway and found unnecessary will not become superfluous if used for accommodation works (*Beauchamp (Lord)* v. *Great Western Rail. Co.* (1868), 3 Ch. App. 745).

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 127.

(*q*) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, C. A.

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vendors in regard to imposing restrictive covenants on the user of the land for their advantage as vendors (*r*).

Right of Pre-emption.

Before the promoters actually dispose (*s*) of any such lands either by sale or by applying them to some purpose not a purpose of the undertaking (*t*), they must, unless the lands be situate within a town or be lands built upon (*a*) or used for building purposes (*b*), first offer to sell the same to the person then entitled to the lands, if any, from which the same were originally severed (*c*). This right of pre-emption arises whenever the company or other body owning the lands decides that they are superfluous and proceed to dispose of them, and it is not necessary that the prescribed period should have elapsed (*d*). If such person refuses to purchase the lands, or cannot after diligent inquiry be found, then the like offer must be made to the person or to the several persons, including persons having limited interests (*e*), whose lands immediately adjoin the lands so proposed to be sold (*f*), provided such persons are capable of entering into a contract for the purchase of such lands. Where more than one person is entitled to this right of pre-emption, the offer must be made to each of these persons in succession, in such order as the promoters think fit (*g*).

Ray v. *Walker*, [1892] 2 Q. B. 88. As to retaining a lien for unpaid purchase-money, see *Re Thackwray and Young* (1888), 40 Ch. D. 34.

(*r*) *Re Higgins and Hitchman* (1882), 21 Ch. D. 95. As to preventing easements of light from being acquired, see *Bonner* v. *Great Western Rail. Co.* (1883), 24 Ch. D. 1, C. A.; *Foster* v. *London, Chatham, and Dover Rail. Co.* (1894), 64 L. J. (Q. B.) 65, C. A.; *Norton* v. *London and North Western Rail. Co.* (1879), 13 Ch. D. 268, at p. 274, C. A. For form of conveyance of superfluous land, see Encyclopædia of Forms, Vol. VIII., p. 112.

(*s*) An agreement for sale is not in itself a disposing of the land (*London and Greenwich Rail. Co.* v. *Goodchild* (1844), 3 Ry. & Can. Cas. 507).

(*t*) *London and South Western Rail. Co.* v. *Blackmore* (1870), L. R. 4 H. L. 610; *Carington (Lord)* v. *Wycombe Rail. Co.* (1868), 3 Ch. App. 377; *Beauchamp (Lord)* v. *Great Western Rail. Co.* (1868), 3 Ch. App. 745. Applying the lands to an extension of the undertaking sanctioned by another Act is not a disposal (*Astley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1858), 27 L. J. (CH.) 478), nor is a compulsory purchase by other promoters (*Dunhill* v. *North Eastern Rail. Co.*, [1896] 1 Ch. 121, C. A.).

(*a*) "Town" is used in its popular sense, and "lands built upon" means continuously built upon, as in a town (*Carington (Lord)* v. *Wycombe Rail. Co., supra; London and South Western Rail. Co.* v. *Blackmore, supra; R.* v. *Cottle* (1851), 16 Q. B. 416—420; *Elliott* v. *South Devon Rail. Co.* (1848), 2 Exch. 725).

(*b*) This means actually used, or at least laid out and sold or leased as building land. See cases cited in note (*a*), *supra*, and *Coventry* v. *London, Brighton and South Coast Rail. Co.* (1867), L. R. 5 Eq. 104.

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 128. As to the meaning of "severed," see *Hobbs* v. *Midland Rail. Co.* (1882), 20 Ch. D. 418, at p. 429, and p. 39, *post*.

(*d*) *Great Western Rail. Co.* v. *May* (1874), L. R. 7 H. L. 283, *per* Lord CAIRNS, L.C., at p. 295, and *Carington (Lord)* v. *Wycombe Rail. Co., supra; London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 560, *per* JESSEL, M.R., at p. 584, C. A.

(*e*) *Coventry* v. *London, Brighton and South Coast Rail. Co., supra*, in which lessees were held entitled to a right of pre-emption.

(*f*) As to the meaning of "adjoining," see last cited case and *London and South Western Rail. Co.* v. *Blackmore, supra; Hooper* v. *Bourne* (1880), 5 App. Cas. 1; *Re Bateman (Baroness) and Parker's Contract*, [1899] 1 Ch. 599.

(*g*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 128. As to enforcing this right and for form of order, see *London and South Western Rail. Co.* v. *Blackmore, supra*, at p. 627.

If any person having this right of pre-emption desires to purchase the land, he must within six weeks after such offer signify such desire to the promoters. If he neglects to do so within that time, or if he declines the offer, his right of pre-emption in respect of the land offered thereupon ceases (*h*). If he accepts the offer, but does not agree with the promoters as to the price of the land, it must be ascertained by arbitration. Such an arbitration is not governed by the sections in the Lands Clauses Acts relating to compensation, and the costs are in the discretion of the arbitrator (*i*). Upon payment or tender to the promoters of the purchase-money so agreed or determined they must convey the land to the purchaser (*k*). The purchaser will acquire no greater right than that of the promoters (*l*), and restrictions existing before the land was taken compulsorily will be revived (*m*).

Exercise of right.

30. If the promoters make default in absolutely selling or disposing of the superfluous lands within the time limited, then all superfluous lands remaining unsold at the expiration of that period absolutely vest in and become the property of the owners of the lands adjoining in proportion to the extent of their lands respectively adjoining the same (*n*). If the land is in fact superfluous, the vesting takes place automatically at the end of the period without any act of the owners of the land adjoining (*o*). The promoters hold the land with this limitation over as to vesting, which vesting is not in the nature of a forfeiture (*p*). It is often

Consequence of default.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 129, which section also enables promoters by a declaration in writing, made by a disinterested person before a justice, to provide themselves with the evidence necessary to show that the right of pre-emption has not or cannot be exercised.

(*i*) *Ibid.*, s. 130; *Jones* v. *South Staffordshire Rail. Co.* (1869), 19 L. T. 603; *Re Eyre's Trusts*, [1869] W. N. 76. The provisions of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), will apply. See title ARBITRATION, Vol. I., p. 437.

(*k*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 131. That section provides also for the execution of the deed and for the form of receipt, and s. 132 contains provisions as to covenants which may be implied by the use of the term "grant," but they may be considered as being to a large extent displaced by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).

(*l*) *Pountney* v. *Clayton* (1883), 11 Q. B. D. 820, C. A.; *Myers* v. *Catterson* (1889), 43 Ch. D. 470, C. A. Compare *Hooper* v. *Bourne* (1877), 3 Q. B. D. 258, C. A.

(*m*) *Bird* v. *Eggleton* (1885), 29 Ch. D. 1012. As to title by possession, see *Bobbett* v. *South Eastern Rail. Co.* (1882), 9 Q. B. D. 424; *Rosenberg* v. *Cooke* (1881), 8 Q. B. D. 162, C. A.; *Midland Rail. Co.* v. *Wright*, [1901] 1 Ch. 738; *Norton* v. *London and North Western Rail. Co.* (1879), 13 Ch. D. 268, C. A.; *Marshall* v. *Taylor*, [1895] 1 Ch. 641, C. A.; *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, C. A.; as to a condition on re-sale, *Best* v. *Hamand* (1879), 12 Ch. D. 1, C. A.

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 127. Where several properties are in contact with the superfluous land, that land will be divided in proportion to the frontage of each (*Moody* v. *Corbett* (1866), L. R. 1 Q. B. 510, Ex. Ch.; and see *Smith* v. *Smith* (1868), L. R. 3 Exch. 282, 287; *Great Western Rail. Co.* v. *May* (1874), L. R. 7 H. L. 283, at p. 303).

(*o*) *Great Western Rail. Co.* v. *May* (1874), L. R. 7 H. L. 283, at p. 298. But if the promoters continue to occupy the land and let it to a tenant, the tenant cannot raise the question as to its being superfluous land (*London and North Western Rail. Co.* v. *West* (1867), 36 L. J. (C. P.) 245).

(*p*) *Miller* v. *Waterford Harbour Commissioners*, [1904] 2 I. R. 421, in which case it was held that in an action to establish that land was superfluous the

SECT. 4. Restrictions as to Land to be taken.

a difficult question to determine whether at the expiration of the ten years or other specified period lands were superfluous or not. It is a mixed question of law and fact (*q*), although the difficulties arise mainly on the facts. The issue of fact to be determined is whether at the expiration of the period the land had become either requisite for the undertaking or would in all probability become requisite within a reasonable time after that date (*r*). That time need not be definite or ascertained provided that it can be shown that the land may be wanted within a reasonable time (*s*). If it may be so wanted, it is not superfluous. Land may in fact become superfluous after the expiration of the period, but in that case these clauses are not applicable. In order that the land should vest in the adjoining owner he must show that it was superfluous at the end of the statutory period (*t*). If it can be shown to be superfluous at that moment of time, an Act passed subsequently extending the time within which the directors of the company may dispose of the superfluous land would not affect the vesting of the lands in the adjoining owners, although they may have made no claim previous to the passing of the Act, because the vesting would in fact have taken place at the end of the statutory period (*a*).

Evidence that land is superfluous.

31. It would be cogent evidence that the land had become superfluous if it had been permanently devoted to some object which was not a purpose of the undertaking, such as the making of a highway (*b*), or if the directors had sold it (*c*) or advertised it for sale and described it as surplus land (*d*), but even these facts are not conclusive, as the acts of the directors may have been *ultra vires* (*e*). The compulsory purchase by another company is not evidence that the land was superfluous (*f*). On the

promoters could not claim exemption from discovery on the ground that discovery might disclose facts by which the land might be forfeited.

(*q*) *Smith* v. *North Staffordshire Rail. Co.* (1880), 44 L. T. 85.

(*r*) *Macfie* v. *Callander and Oban Rail. Co.*, [1898] A. C. 270, *per* Lord WATSON, at p. 284.

(*s*) *Hooper* v. *Bourne* (1877), 3 Q. B. D. 258, *per* BRAMWELL, L.J., pp. 274, 275, C. A.; in H. L. (1880), 5 App. Cas. 1.

(*t*) *Great Western Rail. Co.* v. *May* (1874), L. R. 7 H. L. 283, *per* Lord CAIRNS, at p. 294; *Macfie* v. *Callander and Oban Rail. Co.*, *supra*, at pp. 276, 278; *Hooper* v. *Bourne* (1880), 5 App. Cas. 1; *Re Metropolitan District Rail. Co. and Cosh* (1880), 13 Ch. D. 607, at p. 615, C. A.

(*a*) *Great Western Rail. Co.* v. *May*, *supra*; *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, *per* JESSEL, M.R., at p. 584, C. A.; *Moody* v. *Corbett* (1865), 34 L. J. (Q. B.) 166, (1866) L. R. 1 Q. B. 510, Ex. Ch.

(*b*) *Beauchamp* (*Lord*) v. *Great Western Rail. Co.* (1868), 3 Ch. App. 745.

(*c*) *Carington* (*Lord*) v. *Wycombe Rail. Co.* (1868), 3 Ch. App. 377.

(*d*) *London and South Western Rail. Co.* v. *Blackmore* (1870), L. R. 4 H. L. 610.

(*e*) *Macfie* v. *Callander and Oban Rail. Co.*, [1898] A. C. 270, at p. 284; *Hobbs* v. *Midland Rail. Co.* (1882), 20 Ch. D. 418.

(*f*) *Dunhill* v. *North Eastern Rail. Co.*, [1896] 1 Ch. 121, C. A. Land acquired for spoil-banks and no longer required for that or any fresh purpose would be superfluous (*Great Western Rail. Co.* v. *May*, *supra*; and see for another example *Moody* v. *Corbett* (1865), 5 B. & S. 859; in error (1866), 7 B. & S. 544; L. R. 1 Q. B. 510, Ex. Ch.). Land between a decayed fence and ditch alongside a railway which had been cultivated by the adjoining owner was held to be superfluous (*Norton* v. *London and North Western Rail. Co.* (1879), 13 Ch. D. 268; and see *Ware* v. *London, Brighton, and South Coast Rail. Co.* (1882), 31 W. R. 228).

other hand, land above a tunnel (*g*) or underneath an archway (*h*) is not superfluous land, because the term "land" in such a case is not considered to include a horizontal stratum, and such land might also be required for repairs. It is immaterial that the land is let to tenants or used for other purposes, because promoters of undertakings may use their land in any way not inconsistent with their Act or contrary to the rights of others (*i*).

Letting superfluous land.

Land held by promoters until the time arrives for deciding as to whether or not it is superfluous may also be let or used for purposes other than those directly connected with the undertaking (*k*).

Part III.—Principles of the Law of Compensation.

SECT. 1.—*The Right to Compensation.*

Right to compensation.

32. The right to receive compensation for land taken or injuriously affected depends on the provisions of the statute or order which authorises the taking or injurious affection, and upon the terms of such statute or order will also depend the basis upon which the compensation is to be assessed. If the statute confers no right to compensation, the person who suffers is not entitled to any. If promoters of an undertaking are authorised to do an act, and do it in a proper manner, then, although the act so done works a special injury to a particular individual, that individual cannot maintain an action, and is without remedy unless a remedy is provided by

(*g*) *Re Metropolitan District Rail. Co. and Cosh* (1880), 13 Ch. D. 607; and see *Hooper* v. *Bourne* (1877), 3 Q. B. D. 258, C. A. If land above a tunnel is sold or otherwise acquired, a good possessory title may be acquired under the Statute of Limitations (*Rosenberg* v. *Cook* (1881), 8 Q. B. D. 162, C. A.; *Midland Rail. Co.* v. *Wright*, [1901] 1 Ch. 738; and see *Norton* v. *London and North Western Rail. Co.* (1879), 13 Ch. D. 268; *Marshall* v. *Taylor*, [1895] 1 Ch. 641, C. A.; *Bobbett* v. *South Eastern Rail. Co.* (1882), 9 Q. B. D. 424).

(*h*) *Mulliner* v. *Midland Rail. Co.* (1879), 11 Ch. D. 611.

(*i*) *Bostock* v. *North Staffordshire Rail. Co.* (1855), 4 E. & B. 798; *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273, C. A.; *Teebay* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1883), 24 Ch. D. 572; *Foster* v. *London, Chatham, and Dover Rail. Co.*, [1895] 1 Q. B. 711, C. A.; *Onslow* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1895), 64 L. J. (CH.) 355; *Great Western Rail. Co.* v. *Solihull Rural District Council* (1902), 86 L. T. 852, C. A.; *Lancashire and Yorkshire Rail. Co.* v. *Davenport* (1906), 70 J. P. 129, C. A.

(*k*) *Bayley* v. *Great Western Rail. Co.* (1884), 26 Ch. D. 434; and the cases cited in the two preceding notes. Thus the fact that land has been let for some time for agricultural or mining purposes does not in itself prove that the land is superfluous, and the presumption might be removed by showing that the land is near a town and likely to be wanted for siding accommodation (*Hooper* v. *Bourne* (1880), 5 App. Cas. 1; and see *Betts* v. *Great Eastern Rail. Co.* (1879), 49 L. J. (EX.) 197, H. L. As to the disposal of superfluous land originally acquired by local authorities for small holdings or allotments, see Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), ss. 16, 32.

SECT. 1. The Right to Compensation.

statute (*l*). Since 1845 the provisions of the Lands Clauses Acts, with variations in particular cases (*m*), are inserted in special Acts in order to prescribe the means of obtaining the necessary compensation. Sometimes the special Act expressly provides for compensation being made, and enacts that it shall be ascertained in the manner provided by the Lands Clauses Acts (*n*), but the special Act may by merely incorporating these Acts impliedly confer the right to compensation (*o*).

Principles of compensation.

The numerous cases upon the interpretation of these and the special Acts have led to the enunciation of certain principles which may be said to govern the whole law of compensation. These principles may be conveniently considered under two headings, namely, (1) when land is purchased or taken, and (2) when no land is taken, but land is injuriously affected. There is no clear principle by which an injurious affection can be distinguished from a taking, but different rules for assessing compensation are applicable to the two classes, and the determination of the class into which a particular loss or injury may fall depends upon the terms of the statute authorising the act which causes the injury (*p*). The loss or injury must in both classes be suffered by persons having interests in lands, otherwise they have no right to compensation (*q*), and they are so entitled only when there is a physical interference with their rights (*r*).

(*l*) *East Fremantle Corporation* v. *Annois*, [1902] A. C. 213, at p. 217, P. C.; *British Cast Plate Manufacturers* v. *Meredith* (1792), 4 Term Rep. 794; *Boulton* v. *Crowther* (1824), 2 B. & C. 703. These cases relate to acts by public bodies. As to railway companies, see *Hammersmith and City Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; *London, Brighton, and South Coast Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch.

(*m*) Variations as to the basis of assessing compensation are to be found in general Acts and in local and personal Acts. As to general Acts, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 21, 41; Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 13. In Acts dealing with waterworks provision is often made for the compensation in respect of the interception of a stream being given in the form of a supply of water, called compensation water. See the statute referred to in *Beaumont* v. *Huddersfield Corporation* (1902), 67 J. P. 57, C. A. Remedy by action is also given by s. 27 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17).

(*n*) See, for example, Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 6; Waterworks Clauses Consolidation Act, 1847 (10 & 11 Vict. c. 17), s. 6.

(*o*) See *R.* v. *St. Luke's, Chelsea* (1871), L. R. 6 Q. B. 572.

(*p*) Thus, the appropriation and use of the subsoil of a street has been held to be a taking of land (*Metropolitan Rail. Co.* v. *Fowler*, [1893] A. C. 416; *Farmer* v. *Waterloo and City Rail. Co.*, [1895] 1 Ch. 527), while the permanent fixing in the subsoil of a street of a post for electrical wires for traction purposes has been held not to be a taking (*Escott* v. *Newport Corporation*, [1904] 2 K. B. 369). The laying of pipes and sewers under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 54, is a taking of the subsoil, but so far as procedure is concerned it is treated as an injurious affection (*Taylor* v. *Oldham Corporation* (1876), 4 Ch. D. 395, at p. 411; *Roderick* v. *Aston Local Board* (1877), 5 Ch. D. 328, C. A.). Under the terms of the Thames Embankment Act, 1862 (25 & 26 Vict. c. 93), injury to easements and to rights over land was for purposes of assessing compensation treated as land taken (*Buccleuch (Duke)* v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418, at p. 460). As to nuisance caused by the construction of authorised works, see, *e.g.*, *Goldberg* v. *Liverpool Corporation* (1900), 82 L. T. 362, C. A.; *Ash* v. *Great Northern etc. Rail. Co.* (1903), 67 J. P. 417; *Canadian Pacific Rail. Co.* v. *Roy*, [1902] A. C. 220; and title NUISANCE.

(*q*) See p. 34, *post*.

(*r*) See p. 36, *post*.

SECT. 2.—*Compensation where Lands are purchased or taken.*

SECT. 2. Compensation where Lands are purchased or taken.

SUB-SECT. 1.—*Persons entitled to Compensation.*

Persons entitled to be compensated.

33. All persons who are deprived of any interest in land to be purchased or taken are entitled under the Lands Clauses Acts to receive compensation for such loss as they may sustain (*s*). If a notice to treat for the purchase of the land is served, the date, or rather the moment, of such service fixes the time when the interests of the various parties so served are to be determined for the purposes of compensation (*t*). Interests created after the service of the notice to treat, out of the interest in the land in respect of the purchase of which the notice was served, are not a subject of compensation (*a*). Notices of intention to take land as distinguished from notices to treat are required to be given by some special Acts, and these, in the absence of special provisions, have the same effect as notices to treat (*b*). Promoters of undertakings need not, however, serve notices to purchase all the interests belonging to different persons in a particular parcel of land, if they can determine by notice, or otherwise acquire, those interests (*c*); but the compulsory taking of the estate of a superior landlord is not equivalent to the exercise of a power of resuming possession reserved to the landlord himself, nor does it enable the promoters, for the purpose only of defeating a right to compensation, to prohibit the exercise of a power granted to a lessee, which exercise is subject to the reasonable approval of the lessor or his assigns (*d*). Promoters in

(*s*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 18, 68.

(*t*) *Penny* v. *Penny* (1867), L. R. 5 Eq. 227, *per* PAGE WOOD, V.-C., at p. 236; and see *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ltd.* v. *Pontypridd Waterworks Co.*, [1903] A. C. 426; *Re Athlone Rifle Range*, [1902] 1 I. R. 433. As to service of notice to treat, see p. 64, *post*. If no notice to treat has been served, as in the case of short tenancies, the date of entry will be the time for fixing the interest of the parties (*R.* v. *Great Northern Rail. Co.* (1876), 2 Q. B. D. 151, at p. 155).

(*a*) *Johnson* v. *Edgware, Highgate and London Rail. Co.* (1866), 14 L. T. 45; *Wilkins* v. *Birmingham Corporation* (1883), 25 Ch. D. 78; and compare *Zick* v. *London United Tramways, Ltd.*, [1908] 2 K. B. 126, C. A. Thus, if a lease be granted to a weekly tenant after notice to treat has been served on the landlord, the lesses cannot recover in respect of it (*Re Marylebone* (*Stingo Lane*) *Improvement Act, Ex parte Edwards* (1871), L. R. 12 Eq. 389; and compare *R.* v. *Kennedy*, [1893] 1 Q. B. 533, discussed in *Bexley Heath Rail. Co.* v. *North*, [1894] 2 Q. B. 579, C. A.; *Carter* v. *Great Eastern Rail. Co.* (1863), 8 L. T. 197; *Chilworth Gunpowder Co.* v. *Manchester Ship Canal* (1891), 8 T. L. R. 79).

(*b*) *Tyson* v. *London Corporation* (1871), L. R. 7 C. P. 18; *Morgan* v. *Metropolitan Rail. Co.* (1868), L. R. 4 C. P. 97, Ex. Ch.; *Wilkins* v. *Birmingham Corporation*, *supra*.

(*c*) Promoters may, for example, purchase the lessor's interest and determine the interests of his tenants by notice to quit in the ordinary way (*Syers* v. *Metropolitan Board of Works* (1877), 36 L. T. 277, C. A., *per* JESSEL, M.R., at p. 278; *Ex parte Nadin* (1848), 17 L. J. (CH.) 421; and see *Stevenson* v. *North British Rail. Co.* (1901), 4 F. (Ct. of Sess.) 224).

(*d*) *Fleming* v. *Newport Rail. Co.* (1883), 8 App. Cas. 265, *per* Lord WATSON, at p. 281; *Solway Junction Rail. Co.* v. *Jackson* (1874), 1 R. (Ct. of Sess.) 831. Thus, a railway company, having acquired a reversion, cannot refuse their approval to the sinking of a pit shaft in the land, under a proviso in the lease that the right is subject to the reasonable approval of the lessor or his heirs or assigns, because they thereby wish to defeat the lessee's right to compensation

SECT. 2. Compensation where Lands are purchased or taken.

exercising their compulsory powers must either acquire, determine, or make compensation for all the interests in the land. A person having no greater interest in the land than as a tenant for a year or from year to year, if required to give up possession before the expiration of his time, is therefore entitled to compensation for his loss (*e*). Persons having equitable interests have equally a right with those having legal ones (*f*), as, for example, equitable mortgagees (*g*).

Licensees not entitled.

But only persons having interests in the land taken are entitled to compensation. Persons who have merely licences to use the land or premises have no valid claim (*h*). Thus, a company who were granted what purported to be a lease giving them the exclusive right for a number of years to sell refreshments in a theatre, and to use the bars and other places for that purpose, were held not entitled to compensation, as their rights did not amount to an interest in land (*i*).

Personal rights.

Interests in chattels and personal rights confer no right (*k*). Upon this ground, also, it has been held that tenants who have had their tenancies determined by notice or by the expiration of their term have no right to compensation for loss of profits or otherwise, although they may have had a reasonable expectation of continuing in possession or of having their lease renewed, and have expended money on the ground of such expectancy (*l*).

(*Re Masters and Great Western Rail. Co.*, [1901] 2 K. B. 84, C. A.). Nor can a lessor for a like purpose resume possession of land under a clause allowing him to resume possession for the purpose of building, planting, accommodation, or otherwise (*Johnson* v. *Edgware etc. Rail. Co.* (1866), 35 Beav. 480).

(*e*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121.

(*f*) *Rogers* v. *Kingston-upon-Hull Dock Co.* (1864), 11 L. T. 463 ; *Re King's Leasehold Estates, Ex parte East of London Rail. Co.* (1873), L. R. 16 Eq. 521 ; *Sweetman* v. *Metropolitan Rail. Co.* (1864), 1 Hem. & M. 543 ; *Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1888), 40 Ch. D. 268, C. A. ; *Re North London Rail. Co., Ex parte Cooper* (1865), 34 L. J. (CH.) 373. If, however, promoters purchase from persons, like trustees, who have power of sale by statute or otherwise, it is not necessary to deal with the beneficiaries.

(*g*) *Martin* v. *London, Chatham, and Dover Rail. Co.* (1866), 1 Ch. App. 501 ; and see *Hill* v. *Great Northern Rail. Co.* (1854), 5 De G. M. & G. 66, C. A. ; *Ranken* v. *East and West India Docks* (1849), 12 Beav. 298. For cases of interference with the rights of riparian owners, see *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418; and see *Perks* v. *Great Wycombe Rail. Co.* (1862), 3 Giff. 662 ; *University Life Assurance Society* v. *Metropolitan Rail. Co.*, [1866] W. N. 167 ; *London and India Docks Co.* v. *North London Rail. Co.* (1903), *Times*, 6th Feb.

(*h*) *Municipal Freehold Land Co.* v. *Metropolitan District Rail. Co.* (1883), Cab. & El. 184. Thus, sporting rights may not amount to an interest in land and may afford no ground for compensation (*Bird* v. *Great Eastern Rail. Co.* (1865), 34 L. J. (C. P.) 366). As to when these rights amount to an interest, see *Webber* v. *Lee* (1882), 9 Q. B. D. 315, C. A. ; *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96, C. A.

(*i*) *Frank Warr & Co., Ltd.* v. *London County Council*, [1904] 1 K. B. 713, C. A.

(*k*) *New River Co.* v. *Midland Rail. Co.* (1877), 36 L. T. 539, C. A. ; *Clout* v. *Metropolitan and District Railways Joint Committee* (1883), 48 L. T. 257.

(*l*) *R.* v. *Liverpool and Manchester Rail. Co.* (1836), 4 Ad. & El. 650 ; *Ex parte Nadin* (1848), 17 L. J. (OH.) 421 ; *Re Portsmouth Rail. Co., Ex parte Merrett* (1860), 2 L. T. 471 ; *Syers* v. *Metropolitan Board of Works* (1877), 36 L. T. 277. Such claims have been allowed under the particular terms of a special Act (*Ex parte Farlow* (1831), 2 B. & Ad. 341 ; *Re Palmer and the Hungerford Market Co.*

Similarly, a lessee who exercises an option to determine his lease because of the works of a railway company has no valid claim (*m*).

SUB-SECT. 2.—*The Subjects and Measure of Compensation.*

Full compensation.

34. When a person is entitled to compensation because an interest in land is to be purchased or taken from him, he is entitled to be paid the full amount of the injury thereby done to him. Under the Lands Clauses Acts tribunals assessing compensation for lands to be purchased or taken are required to have regard to the value of the land so to be purchased or taken, and also to the damage, if any, to be sustained by the owner by reason of the severing of the lands taken from the other lands of such owner or otherwise by the injuriously affecting of such other lands by the exercise of the powers of the special Act and the Acts incorporated therewith (*n*).

Time of ascertainment.

35. In assessing the amount, the time of the service of the notice to treat fixes the date at which the condition and value of the premises are to be estimated, as well as the interests of the parties (*o*). Up to the time of receiving a notice to treat an owner of property may go on altering or adding to it, and receive compensation in respect of the alterations and additions, even although he may have known that his premises were in all probability to be taken (*p*), but the special Act may provide to the contrary (*q*). Matters which increase or reduce the value of the property after the date of the notice are immaterial (*r*), provided the owner causes no wilful damage to it. The person who receives a notice to treat is also entitled to be compensated in respect of all the property mentioned therein as required for the purposes of the undertaking, although the promoters may not in fact require all the property included in the notice for some time (*s*).

(1839), 9 Ad. & El. 463). A different question arises as to the chance of a renewal when the lessee's interest is itself the subject of compensation. See note (*l*), p. 37, *post*.

(*m*) *R.* v. *Poulter* (1887), 20 Q. B. D. 132, C. A.

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 63, as regards arbitrators, justices, and surveyors, and s. 49 as regards juries. The two sections are worded somewhat differently, but the measure of compensation is intended to be the same under both (*Holt* v. *Gas Light and Coke Co.* (1872), L. R. 7 Q. B. 728, *per* BLACKBURN, J., at p. 736).

(*o*) *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 260, at p. 273, C. A.; and see cases cited in note (*t*) on p. 33, *ante*. If a lessee holds land under a lease determinable at certain fixed dates, the value of his interest will be assessed as at the date of the notice, the probability at that date of the lease being determined being taken into account (*Re Athlone Rifle Range*, [1902] 1 I. R. 433).

(*p*) *Higgins* v. *Dublin Corporation* (1891), 28 L. R. Ir. (Q. B.) 484.

(*q*) See Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 21 (1) (b).

(*r*) See *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ltd.* v. *Pontypridd Waterworks Co.*, [1903] A. C. 426, *per* Lord HALSBURY, at p. 428, and see on this point the judgments in the Court of Appeal, [1902] 2 K. B. 135. As to the insurance money in the case of fire, see *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753. As to the liability of a lessee to his lessor for breaches of covenant after service of notice and before assignment, see *Mills* v. *East London Union* (1872), L. R. 8 C. P. 79.

(*s*) *Stone* v. *Yeovil Corporation* (1876), 2 C. P. D. 99, C. A.

Compensation where Lands are purchased or taken.

Matters to be considered in ascertaining value.

36. In ascertaining the value of the land, all the actual use of it by the person who holds it and all its potentialities must be considered (*t*). In ascertaining the value to the owner in respect of its use by him, loss of business and of goodwill, in so far as they enhance that value to him, may be regarded (*a*). On the same grounds, loss incurred until other suitable premises are obtained (*b*), costs of removal (*c*), and the value of fixtures if taken or the loss on them if not taken (*d*), are all matters properly to be considered in assessing the value of the land. The compensation for expulsion is determined on the same principles as damages in an action of trespass (*e*), and it follows that if the loss is not the direct consequence of the taking no compensation should be awarded in respect of it (*f*).

All rights which the person enjoys because of his ownership or occupancy are also to be considered in valuing the land. Thus, in the case of a public-house the assessment of the compensation for the lessor's reversion should be based on the fact that it is licensed (*g*), and if it is tied he will be entitled to receive compensation in respect of the benefit he derives from the tying covenant (*h*).

Lessors and lessees.

37. Where the promoters of the undertaking are themselves the tenants of the land taken, the rent which they pay and the terms of

(*t*) *Commissioners of Inland Revenue* v. *Glasgow and South Western Rail. Co.* (1887), 12 App. Cas. 315, *per* Lord HALSBURY, L.C., at p. 321.

(*a*) *White* v. *H.M. Commissioners of Works and Public Buildings* (1870), 22 L. T. 591; *Cooper* v. *Metropolitan Board of Works* (1883), 25 Ch. D. 472, C. A.; and see *Dublin Corporation* v. *Dowling* (1880), 6 L. R. Ir. 502; *Re North London Rail. Co., Ex parte Cooper* (1865), 34 L. J. (CH.) 375; *Morgan* v. *Metropolitan Rail. Co.* (1868), L. R. 4 C. P. 97, Ex. Ch. Thus, if a shop is taken, and the shopkeeper has to move into another shop at a greater rent, or if the lease is shorter, these will be subjects to be considered in arriving at the value to him (*Bidder* v. *North Staffordshire Rail. Co.* (1878), 4 Q. B. D. 412, C. A., at p. 432). So will the probability that the new premises will be less convenient or less likely to attract customers (*R.* v. *Scard* (1894), 10 T. L. R. 545).

(*b*) *Jubb* v. *Hull Dock Co.* (1846), 9 Q. B. 443.

(*c*) *Morgan* v. *Metropolitan Rail. Co.* (1868), L. R. 4 C. P. 97, Ex. Ch.; *R.* v. *Commissioners of Rochdale Improvement Act* (1856), 2 Jur. (N. S.) 861.

(*d*) *Gibson* v. *Hammersmith Rail. Co.* (1863), 32 L. J. (CH.) 337.

(*e*) *Rickets* v. *Metropolitan Rail. Co.* (1865), 34 L. J. (Q. B.) 257, *per* ERLE, C.J., at p. 261, Ex. Ch.

(*f*) Thus, loss of profits caused by the destruction of neighbouring houses in connection with the undertaking, during the interval between the actual taking and the giving of the notice to take, is not a subject of compensation (*R.* v. *Vaughan* (1868), L. R. 4 Q. B. 190). Arrears of rent, the recovery of which was rendered impossible by reason of the taking of land, have also been held too remote (*Re Kilworth Rifle Range*, [1899] 2 I. R. 305).

(*g*) *Bellon* v. *London County Council* (1893), 68 L. T. 411.

(*h*) *Bourne* v. *Liverpool Corporation* (1863), 33 L. J. (Q. B.) 15; *Re Chandler's Wiltshire Brewery Co. and London County Council*, [1903] 1 K. B. 569; and see *Re London County Council and City of London Brewery Co.*, [1898] 1 Q. B. 387. Where the land is taken compulsorily, the lessee is released from his covenants in respect of the land taken (*Slipper* v. *Tottenham and Hampstead Junction Rail. Co.* (1867), L. R. 4 Eq. 112; *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180; and see *Wainwright* v. *Ramsden* (1839), 5 M. & W. 602; *Mills* v. *East London Union* (1872), L. R. 8 C. P. 79), but when a covenant is severable it will still apply to the remainder (*Re Furness and Willesden Urban Council* (1905) 70 J. P. 25); *Piggott* v. *Middlesex County Council*, [1909] 1 Ch. 134.

the lease are properly considered in assessing the value of the reversion (*i*). Conversely, where land was let at a rent below its value but with a proviso that, in the event of any part of it being taken compulsorily, the lessor could re-enter, it was held that the lessor ought to be compensated on the basis of the full value, and not on that of the rent actually paid (*k*). Similarly, in assessing a lessee's interest he will be entitled to be compensated in respect of any right he may have to a renewal of his lease (*l*). Low rent and the incidents likely to determine the lease must be regarded (*m*), together with such rights as he may have under his lease (*n*).

Yearly tenants.

38. Any person who has no greater interest in land than as a tenant for a year or from year to year, on being required to give up possession before the expiration of his term, is entitled to compensation for the value of his unexpired term or interest, and for any just allowance which ought to be made to him by an incoming tenant, as well as for any loss or injury from severance (*o*), so that he is entitled to compensation for every kind of damage or loss he may suffer (*p*).

Reinstatement.

39. When the land is used for some particular purpose not of a commercial nature, such as for a public park, or for a church or school, it is very difficult to estimate the loss. One method adopted is that known as reinstatement, by which is meant that the amount of compensation to be awarded shall be assessed according to the cost of acquiring an equally convenient site and erecting equally convenient premises (*q*). This method is sometimes prescribed by statute in particular cases, but is only applicable where land for reinstatement is available or can be obtained on reasonable terms (*r*).

Potential value.

40. Tribunals assessing compensation may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events it might within a reasonable period be applied, just as an owner

(*i*) *Eldon (Earl)* v. *North Eastern Rail. Co.* (1899), 80 L. T. 723; *Re Athlone Rifle Range*, [1902] 1 I. R. 433.

(*k*) *Re Morgan and London and North Western Rail. Co.*, [1896] 2 Q. B. 469.

(*l*) *Bogg* v. *Midland Rail. Co.* (1867), L. R. 4 Eq. 310. In a Scottish case (*Lynch* v. *Glasgow Corporation* (1903), 5 F. (Ct. of Sess.) 1174), it was held that a chance of renewal could not be taken into consideration in assessing the value of a lessee's interest even when it added to its market value. But see *Holt* v. *Gas Light and Coke Co.* (1872), L. R. 7 Q. B. 728, at pp. 735, 738. As to mere expectation of renewal, see p. 34, *ante*.

(*m*) *Penny* v. *Penny* (1867), L. R. 5 Eq. 227.

(*n*) *Re Macintosh and Pontypridd Improvements Co.* (1891), 61 L. J. (Q. B.) 164. In *R.* v. *Poulter* (1887), 20 Q. B. D. 132, C. A., it was held that the voluntary termination of a lease because of the works of a company gave no claim.

(*o*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121.

(*p*) *R.* v. *Great Northern Rail. Co.* (1876), 2 Q. B. D. 151, at p. 156.

(*q*) See, for example, *London School Board* v. *South Eastern Rail. Co.* (1887), 3 T. L. R. 710, C. A.; *Metropolitan and District Rail. Cos.* v. *Burrow* (1884), reported in Hudson on Compensation, 1521, H. L.

(*r*) See an award by Lord SHAND in *Edinburgh Corporation* v. *North British Rail. Co.* (1892), reported in Browne and Allan's Law of Compensation, 2nd ed., p. 656.

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might do if he were bargaining with a purchaser in the market (*s*). This value for future purposes is generally referred to as the potential value of the land. The principle is applicable whether the owner has acquired the land in order to use it for some particular purpose, or whether he has no such present intention (*t*).

Where the prospective use of land depends on the making of an Order in Council, the possibility of obtaining such an Order may be taken into consideration in assessing the compensation (*a*).

Test for ascertaining loss.

The purpose for which the promoters intend to use the land is not such a use, as can be considered in estimating the potential value, when that value is created or enhanced simply by the act or scheme of the promoters (*b*). The loss is tested by the value to the person from whom the land is taken, and not by the value to the persons acquiring it. It follows, that if the person claiming compensation can make no use of the land, nor obtain any value for it in the market by reason of the restrictions on his ownership, he practically suffers no loss, and is therefore entitled to merely nominal compensation (*c*).

(*s*) *R.* v. *Brown* (1867), L. R. 2 Q. B. 630, *per* Lord COCKBURN, at p. 631, in which case it was held that the potential value of agricultural land for building purposes should be considered; and see *Streatham Estate Co.* v. *Commissioners of Public Works* (1888), 52 J. P. 615; *R.* v. *West Riding, Yorkshire* (*Justices*) (1834), 1 Ad. & El. 563. If land is near a reservoir and in consequence is suitable for the building of a mill, that fact also is to be considered in assessing the value (*Ripley* v. *Great Northern Rail. Co.* (1875), 10 Ch. App. 435). So mines which cannot be worked at a profit may have a potential value (*Brown* v. *Commissioner for Railways* (1890), 15 App. Cas. 240, P. C.).

(*t*) *Bailey* v. *Isle of Thanet Light Railways*, [1900] 1 Q. B. 722, where land was bought for a school and no other suitable land was available. In one case where the conservators of a river had power by statute to grant licences to persons for the purpose of making docks, wharves, and other works on the foreshore, and to charge for the same according to the value to the person receiving the licence, and a railway company were authorised to take part of the said foreshore for a wharf, it was held that the probability of the railway company requiring this land and paying for it on that basis should be considered (*Thames Conservators* v. *London, Tilbury, and Southend Rail. Co.* (1892), 68 L. T. 21). In *Thames Conservators* v. *Victoria Station and Pimlico Rail. Co.* (1868), L.R. 4 C. P. 59, it was held that the approval by the conservators of certain plans for a bridge over the river did not destroy their right to compensation.

(*a*) *City and South London Rail. Co.* v. *St. Mary, Woolnoth, and St. Mary, Woolchurch Haw* (*United Parishes*), [1905] A. C. 1, where in assessing the value of the subsoil of a church the fact that the land might be made available for building purposes by an Order in Council made under the Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), was held to be rightly taken into account.

(*b*) *Re Gough and Aspatria, Silloth and District Joint Water Board*, [1904] 1 K. B. 417, p. 423, C. A.

(*c*) *Stebbing* v. *Metropolitan Board of Works* (1870), L. R. 6 Q. B. 37, at p. 42; *Manmatha Nath Mitter* v. *Secretary of State for India* (1897), L. R. 24 Ind. App. 177; *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*, [1901] A. C. 373, P. C. On this principle a rector was held entitled to practically no compensation in respect of disused burial grounds which were taken from him for public improvements, because he could not have alienated them, and in his hands they were practically valueless (*Stebbing* v. *Metropolitan Board of Works*, *supra*). It has been doubted whether the land should have been considered valueless in the hands of the rector. See *Re City and South London Rail. Co. and St. Mary, Woolnoth and St. Mary, Woolchurch Haw* (*United Parishes*), [1903] 2 K. B. 728, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 736, and *Hilcoat* v. *Canterbury and York* (*Archbishops*) (1850), 19 L. J. (C. P.) 376; and

Special adaptability of land.

41. If, however, the land is peculiarly suitable or adaptable for some particular purpose, as, for example, the construction of a reservoir, that fact must be taken into account in assessing the compensation, and it is immaterial that such purpose is the one to which the promoters propose to apply it. If that adaptability gives it an enhanced market value, it must be taken into account in assessing the value of the land (*d*), and this is also the case where the land in question, if used with other adjoining land, would be specially adapted for a particular purpose, and it may be so taken into account even although parliamentary powers may be necessary to acquire such other land (*e*). It is for the person assessing the compensation to consider to what extent this adaptability enhances the value (*f*).

Addition for compulsory purchase.

42. In assessing the value of land taken it is a usual practice to add a certain percentage (usually 10 per cent.) for what is termed compulsory purchase. There are no provisions in the Lands Clauses Acts dealing with such an addition. In some Acts there is inserted a special provision that no sum shall be awarded for compulsory purchase (*g*).

SUB-SECT. 4.—*Damage to other Lands of Owner.*

Injury by severance.

43. When part of an owner's land is taken, he may suffer damage in consequence of the injury thereby caused to his remaining land. It may, for instance, be cut into two parts, as when a line of railway is made through an estate, or the alteration in its size or shape may render it less suitable for the purposes to which it was or might have been applied. It may be also rendered less valuable by reason of the construction, existence, and carrying on of the undertaking in its vicinity. Under the Lands Clauses Acts the owner of land taken is entitled to compensation for damage sustained by him by reason of such severing or other injuriously affecting his other lands (*h*).

What constitutes severance.

Whether there has been something in the nature of a severance of his land is a question of fact in each case, but in order that there should be a severance it is not necessary that the part taken and the part left should be in actual contiguity. The principle is that where several pieces of land owned by the same person are so

compare *Campbell* v. *Liverpool Corporation* (1870), L. R. 9 Eq. 579; *Re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173; *Ex parte Liverpool (Rector)* (1870), L. R. 11 Eq. 15; *Ex parte St. Martin's, Birmingham (Rector)* (1870), L. R. 11 Eq. 23.

(*d*) *Re Riddell and Newcastle and Gateshead Water Co.* (1878-9), reported in Browne and Allan's Law of Compensation, 2nd ed., p. 672, C. A.; *Re Ossalinsky (Countess) and Manchester Corporation* (1883), reported *ibid.*, p. 659; *Re Gough and Aspatria, Silloth and District Joint Water Board*, [1904] 1 K. B. 417, C. A. *Trent-Stoughton* v. *Barbadoes Water Supply Co.*, [1893] A. C. 502, P. C.; *Blantyre (Lord)* v. *Babtie* (1888), 13 App. Cas. 631.

(*e*) *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K. B. 16, C. A.; *Re Tynemouth Corporation and Northumberland (Duke)* (1903), 89 L. T. 557.

(*f*) Cases cited in notes (*d*) and (*e*), *supra*.

(*g*) *E.g.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 21; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9 (10); Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 39 (5).

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 49, 63; and see p. 35, *ante*.

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near to each other and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Acts, so that, if one piece is compulsorily taken, the owner will be entitled to compensation for damage by severance and injurious affection to the remainder (*i*). The fact that a railway or a road intervenes between the lands taken and the other land of the owner will not of itself necessarily prevent him from recovering compensation for severance (*k*). It is not necessary that the owner should hold the land with respect to which damage is claimed by the same title as the land that is taken (*l*).

There may be a lateral severance as well as a vertical one, as when the sub-soil is taken for a tunnel (*m*). Mines and minerals also may be severed from the soil (*n*), but as to these special statutory provisions exist (*o*).

In estimating the compensation payable for severance both the actual and prospective use of the land must be considered (*p*).

A right of pre-emption over land not taken, being a personal right, does not confer a right to damage for severance (*q*).

Anticipated injury.

44. An owner is also entitled to claim compensation for future anticipated injury caused by the existence of the works (*r*). The promoters of certain undertakings, such as railways, are required to make and maintain certain works for the accommodation of the owners and occupiers of lands adjoining the undertaking (*s*). In determining the compensation the fact that these works may be ordered should be taken into account, but it has to be borne in

(*i*) *Cowper-Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153, *per* Lord WATSON, at p. 167 ; and see *Caledonian Rail. Co.* v. *Lockhart* (1860), 3 Macq. 808, at p. 815, H. L. ; and compare *R.* v. *Kennedy*, [1893] 1 Q. B. 533, explained in *Bexley Heath Rail. Co.* v. *North*, [1894] 2 Q. B. 579, C. A.

(*k*) *Cowper-Essex* v. *Acton Local Board*, *supra*.

(*l*) Where a company took some land leased to a volunteer corps, which land was behind their rifle butts and held by them to prevent injury from stray bullets, and between the land taken and the butts was other land as to which they had only a verbal agreement, it was held that the rifle range and the other land were held together so as to entitle the corps to compensation for severance (*Holt* v. *Gas Light and Coke Co.* (1872), L. R. 7 Q. B. 728).

(*m*) *City and South London Rail. Co.* v. *St. Mary, Woolnoth and St. Mary, Woolchurch Haw* (*United Parishes*), [1905] A. C. 1.

(*n*) *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559, C. A.

(*o*) See p. 49, *post*.

(*p*) Thus, if the amenity of a mansion-house is destroyed, as by taking away its river frontage and substituting a road, the owner will be entitled to compensation for such injury (*Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418). In this case the riparian rights were defined as land by the special Act. For a case of injury to a warehouse by taking away rights over a road, see *Re Great Eastern Rail. Co. and London County Council* (1908), 72 J. P. 1, C. A. Then, again, if land which might have become suitable for building purposes is rendered unsuitable, the owner is entitled to claim compensation on that basis (*R.* v. *Brown* (1867), L. R. 2 Q. B. 630 ; and, for another example, see *Ripley* v. *Great Northern Rail. Co.* (1875), 10 Ch. App. 435).

(*q*) *Clout* v. *Metropolitan and District Railways Joint Committee* (1883), 48 L. T. 257.

(*r*) As, for example, damage from floods (*Caledonian Rail. Co.* v. *Lockhart* (1860), 3 Macq. (H. L.) 808).

(*s*) *E.g.*, Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68.

mind that such works are limited to the existing, and not to the potential, use of the land (*t*). Promoters, however, cannot reduce the amount of compensation payable by offering to undertake not to use the land taken or part of it for the particular purpose for which its taking was authorised, as such an undertaking would be invalid, but an undertaking not to use the land for certain purposes compatible with the purposes for which the land was acquired would be valid (*a*).

Damage by user of land.

An owner is also entitled to compensation for the damage caused to his remaining land in respect of the use to which the land taken from him is to be put, in addition to that caused merely by the construction of the undertaking (*b*). In this respect the compensation to be awarded differs from that to which a person is entitled for injurious affection of his land when no land is taken from him (*c*).

Damage by severance etc.

In assessing compensation for severance and injurious affection all damage that can be reasonably foreseen should be taken into account (*d*), and will in subsequent proceedings be deemed to have

(*t*) *R.* v. *Brown* (1867), L. R. 2 Q. B. 630; and see *Re Gonty and Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1896] 2 Q. B. 439, C. A.

(*a*) *Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623, and *per* Lord BLACKBURN, at p. 634, and Lord FITZGERALD, at p. 640; *Re South Eastern Rail. Co. and Wiffin's Contract*, [1907] 2 Ch. 366.

(*b*) *Cowper-Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153, *per* Lord HALSBURY, at p. 162, and *per* Lord MACNAGHTEN, at p. 178, approving *Re Stockport, Timperley, and Altrincham Rail. Co.* (1864), 33 L. J. (Q. B.) 251. *Buccleuch (Duke)* v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418, has also been quoted as establishing the same proposition; but see *Caledonian Rail. Co.* v. *Walker's Trustees* (1882), 7 App. Cas. 259, *per* Lord BLACKBURN, at p. 297, and *per* Lord MACNAGHTEN, at p. 176, of the case first cited in this note.

(*c*) *Hammersmith Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171. If part of a person's land is taken for the construction of a railway, and a mill exists on the remaining land which will be so close to the railway when constructed as to be in danger of fire from the sparks of the engines using the railway, the reduction in value of the mill will be a subject of compensation (*Re Stockport, Timperley, and Altrincham Rail. Co., supra*). If no land was taken, the owner would be entitled to no compensation. If land is taken for sewage works, and other land held therewith is used for building purposes, the reduction in value of the building land because of the existence and use of the sewage works will also be properly taken into account in assessing the compensation (*Cowper-Essex* v. *Acton Local Board, supra*). The making of a road adjoining a dwelling-house and the dust and noise therefrom, if the road is on land taken, may also be regarded as injurious affection of the remaining land (*Buccleuch (Duke)* v. *Metropolitan Board of Works, supra; R.* v. *Mountford, Ex parte London United Tramways* (1901), *Ltd.*, [1906] 2 K. B. 814); and see *Great Eastern Rail. Co. and London County Council* (1907), 98 L. T. 116, C. A. (land taken for a public footway). Compensation has also been awarded for the injury to neighbouring houses because of the erection and carrying on of a school on land belonging to the same owner (*R.* v. *Pearce, Ex parte London School Board* (1898), 78 L. T. 681; and for another example, see *R.* v. *Sheward* (1880), 9 Q. B. D. 741, C. A.). The use of land for military purposes may cause injurious affection to the remaining land, because of the firing of guns and the incidentals of camp life (*Blundell* v. *R.*, [1905] 1 K. B. 516, approving and following *R.* v. *Abbott*, [1897] 2 I. R. 362; *Re Ned's Point Battery*, [1903] 2 I. R. 192).

(*d*) *Brogden* v. *Llynvi Valley Rail. Co.* (1860), 30 L. J. (C. P.) 61; *Brown* v. *Railways Commissioner* (1890), 15 App. Cas. 240; and see *Chamberlain* v. *West End of London and Crystal Palace Rail. Co.* (1863), 2 B. & S. 605, at p. 639, Ex. Ch. Questions of this kind generally arise in respect of injurious affection when no land is taken, as to which see sect. 3, pp. 43 *et seq.*, *post*.

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been so taken (*e*). The compensation has to be settled once and for all (*f*). The damage, however, must not be too remote (*g*).

When compensation not payable.

45. If where land is taken from an owner, his remaining land is injuriously affected by the carrying on of the undertaking in connection with which his land was taken, but such injurious affection is not due to the part of the works constructed on the land taken from him, but to that constructed on other land, he is not entitled to compensation for such injurious affection (*h*). Thus, where a tramway company were authorised to lay tram lines in a street, but only on condition that the street was widened, it was held that the owner of the land taken for the purposes of street widening, and on which the tramway was not laid, was not entitled to compensation for the injurious affection to his other land by reason of the running of the trams (*i*).

Betterment.

It may happen that although a person's land is injured by

(*e*) *Mercer* v. *Liverpool, St. Helens, and South Lancashire Rail. Co.*, [1904] A. C. 461. Thus, if a stratum of land is acquired for the purpose of constructing a tunnel, and compensation is paid for the site of the tunnel and for the injurious affection, the owner of the land above cannot afterwards recover compensation or damages if, by reason of subsidence or the vibration caused by passing trains, serious injuries are subsequently caused to the buildings over the tunnel (*Croft* v. *London and North Western Rail. Co.* (1863), 32 L. J. (Q. B.) 113).

(*f*) *Ibid.*, at p. 119. So when promoters have power and intend to take the whole of a stream they must pay at once for the whole, and not compensate the riparian owners from time to time as the amount of water diverted is increased (*Stone* v. *Yeovil Corporation* (1876), 2 C. P. D. 99, C. A.). It has not yet been decided whether damages which are neither foreseen nor guessed at can form the basis of a second claim for compensation; see *Lawrence* v. *Great Northern Rail. Co.* (1851), 16 Q. B. 643; *Lancashire and Yorkshire Rail. Co.* v. *Evans* (1851), 15 Beav. 322; *A.-G.* v. *Metropolitan Rail. Co.*, [1894] 1 Q. B. 384, C. A. In some Acts provision is made for the assessment of compensation from time to time. See Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 81.

(*g*) Thus, the fact that a greater burden might be placed on the rates for the purpose of educating the children of the workmen brought into the district for the construction of the works is considered too remote a consequence of that construction to entitle the owner to compensation in respect of it, although the increase in the rates which he might have to pay would be substantial (*Re Tynemouth Corporation and Northumberland (Duke)* (1903), 89 L. T. 557; and see also *Re Kilworth Rifle Range*, [1899] 2 I. R. 305). So, if land is taken for a camp and artillery range, while the loss of privacy and amenity and the vulgarisation of the neighbourhood may form proper grounds to be considered in estimating compensation, the loss from apprehended trespass by soldiers and others would not (*Re Ned's Point Battery*, [1903] 2 I. R. 192).

(*h*) *City of Glasgow Union Rail. Co.* v. *Hunter* (1870), L. R. 2 Sc. & Div. 78, *per* Lord CHELMSFORD, at p. 82; *Caledonian Rail. Co.* v. *Ogilvie* (1856), 2 Macq. 229, H. L.; *Cowper-Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153, *per* Lord WATSON, at p. 166; *Horton* v. *Colwyn Bay and Colwyn Urban Council*, [1908] 1 K. B. 327, C. A., and cases cited in note (*i*), *infra*. Thus an owner was held not to be entitled to compensation for the noise and smoke of trains on a railway bridge built on land belonging to another person, although part of his land was taken for other purposes of the railway (*City of Glasgow Union Rail. Co.* v. *Hunter*, *supra*).

(*i*) *R.* v. *Mountford, Ex parte London United Tramways* (1901), *Ltd.*, [1906] 2 K. B. 814. Some doubt has been raised as to how far the proposition in the text is applicable when the land taken has to be physically occupied for the working of the undertaking (*ibid.*, *per* PHILLIMORE, J., at p. 821, and in *Re London and North Western Rail. Co. and Reddaway* (1907), 71 J. P. 150, at p. 151).

severance or suffers other injurious affection by reason of the construction of the undertaking, yet nevertheless the value of the remaining premises may be enhanced by the fact of the existence of the undertaking. Such enhanced value cannot under the Lands Clauses Acts be set off against the damage by severance or injurious affection (*k*). In some general Acts (*l*), and in some local and personal Acts, provisions are inserted enabling this enhanced value to be taken into account in assessing the compensation (*m*). In some Acts authorising public improvements provisions have also been inserted for recovering from adjoining owners what is known as the betterment of their land by reason of the improvement. These provisions extend to all the land in a specified area, independently of the consideration whether or not there has been severance or other injurious affection (*n*).

SECT. 3.—*Compensation for Injurious Affection.*

SUB-SECT. 1.—*The Right to Compensation.*

Compensation where no land taken.

46. The foregoing section relates to the right to compensation of a person whose lands, or a portion thereof, have been taken by the promoters, but it may well happen that a person's land may be injuriously affected by reason of the construction of a statutory undertaking on land not acquired from him. The right to compensation for such injurious affection is governed to some extent by different rules from those which apply when a man's land is damaged owing to part thereof being taken and used for an undertaking (*o*). Under special Acts incorporating the necessary sections of the Lands Clauses Acts (*p*) compensation is payable under certain conditions in respect of both classes of injurious affection (*q*). There are, however, statutes both of local and

(*k*) *Eagle* v. *Charing Cross Rail. Co.* (1867), L. R. 2 C. P. 638; *Senior* v. *Metropolitan Rail. Co.* (1863), 2 H. & C. 258, at p. 269.

(*l*) *E.g.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38 (8); and see p. 165, *post*, and title PUBLIC HEALTH ETC.

(*m*) As an example of the application of such provisions, see *Harding* v. *Board of Land and Works* (1886), 11 App. Cas. 208, P. C., a case from Victoria.

(*n*) For an example of these provisions, see London County Council (Tower Bridge Southern Approach) Act, 1895 (58 & 59 Vict. c. cxxx.); and as to the interpretation of these clauses, see *Re London County Council and City of London Brewery Co.*, [1898] 1 Q. B. 387; *The Oxford, Ltd.* v. *London County Council*, [1898] 2 Ch. 491. For a very early example, see 19 Car. 2, c. 3, s. 26.

(*o*) See p. 41, *ante*.

(*p*) Ss. 16—68 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

(*q*) *R.* v. *St. Luke's* (1871), L. R. 6 Q. B. 572, L. R. 7 Q. B. 148, Ex. Ch. As to whether the incorporation of s. 68 of the Lands Clauses Consolidation Act, 1845, in itself confers a right to compensation, see *Ferrar* v. *Commissioners of Sewers of City of London* (1869), L. R. 4 Exch. 1 and 227, Ex. Ch.; *Broadbent* v. *Imperial Gas Light Co.* (1857), 26 L. J. (CH.) 276, at p. 280. If ss. 16—68 of that Act are not incorporated, a person injured will not be entitled to compensation for injurious affection (*R.* v. *London Corporation*, (1867), L. R. 2 Q. B. 292; *Dungey* v. *London Corporation* (1869), 38 L. J. (C. P.) 298; *Baker* v. *St. Marylebone Vestry* (1876), 35 L. T. 129). If these sections are incorporated, but powers under them cannot be put in force without a provisional order, it has been held that a person may nevertheless be injuriously affected without such order, and may be entitled to compensation (*Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437, C. A.).

SECT. 3. Compensation for Injurious Affection.

general application, as, for example, the Highway Act, 1835 (*r*), which do not incorporate or contain sections allowing for compensation for injurious affection. In such cases no compensation is recoverable (*s*). On the other hand, there are statutes which provide for compensation for injurious affection without incorporating the whole of the Lands Clauses Acts or authorising any land to be taken (*t*).

Only in respect of authorised acts.

47. In cases where compensation is recoverable for injurious affection under a special Act, the person injured can only recover in respect of losses sustained in consequence of what the promoters have lawfully done under their statutory powers (*a*). If they exceed those powers, either by doing an act not authorised or by doing an authorised act in a negligent manner, the person injured will have a remedy by action, and will not be entitled to compensation (*b*). If they, while carrying out their authorised works, fail to take sufficient care to prevent damage, they will be liable to an action in respect of such injury (*c*), and also to pay compensation for the damage caused by their authorised acts (*d*).

And for damage which would have been actionable.

48. In order to entitle a person to recover compensation for injurious affection the damage must arise from something which would, if done without statutory authority, have given rise to a cause of action (*e*). In other words, in order to have a right to compensation against promoters of an undertaking in respect of any act done under their statutory powers, the person claiming must have had a good cause of action in respect of that act, if it had been done by any person not so authorised (*f*). The promoters of an undertaking, having acquired land, may therefore use it in any way in

(*r*) 5 & 6 Will. 4, c. 50.

(*s*) *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264.

(*t*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 6; Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 17; Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 7; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308; Railway Fires Act, 1905 (5 Edw. 7, c. 11), s. 2.

(*a*) *Caledonian Rail. Co.* v. *Colt* (1860), 3 Macq. 833, H. L.; *Imperial Gas Light and Coke Co.* v. *Broadbent* (1859), 7 H. L. Cas. 600.

(*b*) See, for example, *Brine* v. *Great Western Rail. Co.* (1862), 31 L. J. (Q. B.) 101; *Roberts* v. *Charing Cross, Euston, and Hampstead Rail. Co.* (1903), 87 L. T. 732; *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125; *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430; *Cator* v. *Lewisham Board of Works* (1865), 34 L. J. (Q. B.) 74, Ex. Ch.; *Lawrence* v. *Great Northern Rail. Co.* (1851), 20 L. J. (Q. B.) 293; *R.* v. *Darlington Local Board of Health* (1865), 35 L. J. (Q. B.) 45, Ex. Ch.

(*c*) *Clothier* v. *Webster* (1862), 12 C. B. (N. S.) 790; *Biscoe* v. *Great Eastern Rail. Co.* (1873), L. R. 16 Eq. 636; *Hall* v. *Batley Corporation* (1877), 47 L. J. (Q. B.) 148; *Fairbrother* v. *Bury Rural Sanitary Authority* (1889), 37 W. R. 544.

(*d*) *Uttley* v. *Todmorden Local Board of Health* (1874), 44 L. J. (C. P.) 19. If undertakers are required to conform to local Building Acts and fail to do so, the remedy of a person injured by such failure is by action, and not by claim for compensation (*Lewis and Solome* v. *Charing Cross etc. Rail. Co.*, [1906] 1 Ch. 508).

(*e*) *Glover* v. *North Staffordshire Rail. Co.* (1851), 16 Q. B. 912; *Ricket* v. *Metropolitan Rail. Co.* (1867), L. R. 2 H. L. 175; *Metropolitan Board of Works* v. *McCarthy* (1874), L. R. 7 H. L. 243; *Caledonian Rail. Co.* v. *Walker's Trustees* (1882), 7 App. Cas. 259.

(*f*) It is immaterial whether the right interfered with would be enforceable at law or in equity (*Furness Rail. Co.* v. *Cumberland Co-operative Building Society* (1884), 52 L. T. 144, H. L.).

which an adjoining owner might have lawfully used it without conferring any right to compensation (*g*). For the same reason, damages which would be too remote to be recovered in an action cannot be recovered as compensation (*h*).

(*g*) Thus, they may erect an embankment on the land acquired and destroy the amenity of adjoining property (*Re Penny and South Eastern Rail. Co.* (1857), 7 E. & B. 660). They may block up access of light and air so long as no easement is interfered with (*Butt* v. *Imperial Gas Co.* (1866), 2 Ch. App. 158; *Eagle* v. *Charing Cross Rail. Co.* (1867), L. R. 2 C. P. 638); they may remove the support of buildings in cases where the right of support has not been acquired (*Metropolitan Board of Works* v. *Metropolitan Rail. Co.* (1868), L. R. 3 C. P. 612, (1869) L. R. 4 C. P. 192, Ex. Ch.); they may sink springs and draw off the underground water (*New River Co.* v. *Johnson* (1860), 29 L. J. (M. C.) 93; *R.* v. *Metropolitan Board of Works* (1863), 32 L. J. (Q. B.) 105; and compare *Bradford Corporation* v. *Pickles*, [1895] A. C. 587); they may pull down houses, and so injure the business of neighbouring shops (*R.* v. *Vaughan* (1868), L. R. 4 Q. B. 190; *R.* v. *London Dock Co.* (1836), 5 Ad. & El. 163); or build new houses, making use of party walls under local Building Acts, causing the adjoining owner loss of trade and inconvenience (*R.* v. *Hungerford Market Co., Ex parte Yeates* (1834), 1 Ad. & El. 668, and *Ex parte Eyre* (1834), 1 Ad. & El. 676); they may exercise the rights of ordinary riparian owners (*Rhodes* v. *Airedale Drainage Commissioners* (1876), 1 C. P. D. 380, at p. 402); they may build a bridge and injure a ferry (*Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224, C. A.; *R.* v. *Cambrian Rail. Co.* (1871), L. R. 6 Q. B. 422; and see *Dibden* v. *Skirrow*, [1908] 1 Ch. 41, C. A.); they may block up private roads on building estates unless the persons damaged can show they have a right to such roads (*Fleming* v. *Newport Rail. Co.* (1883), 8 App. Cas. 265; *Furness Rail. Co.* v. *Cumberland Co-operative Building Society* (1884), 52 L. T. 144, H. L.). As obstruction of a public way gives rise to no cause of action to a person unless he suffers special damage different from that of the rest of the public, so such person will have no claim to compensation for like acts by undertakers unless special damage can be shown (*Herring* v. *Metropolitan Board of Works* (1865), 19 C. B. (N. S.) 510; *R.* v. *Metropolitan Board of Works* (1869), L. R. 4 Q. B. 358; *Ricket* v. *Metropolitan Rail. Co.* (1867), L. R. 2 H. L. 175; *R.* v. *London Dock Co.* (1836), 5 Ad. & El. 163; and see *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Anderson*, [1898] 2 Ch. 394, C. A.). As to cases where special damage can be shown, see *Beckett* v. *Midland Rail. Co.* (1867), L. R. 3 C. P. 82, at p. 97; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; *Ford* v. *Metropolitan and Metropolitan District Rail. Cos.* (1886), 17 Q. B. D. 12, at pp. 20, 24, 28, C. A. A company acting under statutory powers is treated as a private individual acting within his own rights. If it does an act which it is authorised by law to do, and does it in a proper way, though the act works a special injury to a particular individual, such individual cannot maintain an action, and is without remedy unless one is provided by statute (*East Fremantle Corporation* v. *Annois*, [1902] A. C. 213, P. C.). If, however, such a company does an authorised act in a negligent or unreasonable way, it will be liable to an action for damages, and, in a proper case, for an injunction; and the fact that a right to compensation is given by statute does not exclude the restraining jurisdiction of the court (*Roberts* v. *Charing Cross, Euston and Hampstead Rail. Co.* (1903), 87 L. T. 732; *Ash* v. *Great Northern, Piccadilly and Brompton Rail. Co.* (1903), 67 J. P. 417); see also cases in note (*b*) on p. 44, *ante*, and title NUISANCE.

(*h*) *R.* v. *Poulter* (1887), 20 Q. B. D. 132, C. A.; *Re Clarke and Wandsworth District Board of Works* (1868), 17 L. T. 549; *Birkenhead Corporation* v. *London and North Western Rail. Co.* (1885), 15 Q. B. D. 572, C. A.; and compare *Knock* v. *Metropolitan Rail. Co.* (1868), L. R. 4 C. P. 131; *Sydney Corporation* v. *Young*, [1898] A. C. 457. Thus, an occupier of a public-house situated by the side of a public footway was held for both these reasons not to be entitled to recover compensation for loss of business caused by certain streets which led to this footway being temporarily obstructed, whereby the access to the house was rendered inconvenient (*Ricket* v. *Metropolitan Rail. Co.* (1867), L. R. 2 H. L. 175; and see *Bigg* v. *London Corporation* (1873), L. R. 15 Eq. 376).

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49. It is also necessary, in order to entitle a person to recover compensation under the Lands Clauses Acts for injurious affection, that the right of action which would have existed if the work had not been authorised must be more than a merely personal right. It must have reference to land or its incidents, otherwise compensation is not due (*i*). The damage must arise from a physical interference with some right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which gives an additional market value to it apart from the uses to which any particular owner or occupier might put it. If by reason of such interference the property is lessened in value, there will be a title to compensation (*k*).

Only in respect of land.

Public rights.

The right, however, may be a public right, such as the right of access to premises by a public highway (*l*). Compensation will be payable for damage or loss occasioned by interference with such a right, provided the injury suffered would at common law have afforded a cause of action (*m*).

(*i*) *Caledonian Rail. Co.* v. *Walker's Trustees* (1882), 7 App. Cas. 259, *per* Lord SELBORNE, L.C., at p. 276. Under other Acts, such as the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308, compensation may be claimed for losses of a personal nature. See, for example, *Re Bater and Birkenhead Corporation*, [1893], 1 Q. B. 679; 2 Q. B. 77, C. A.

(*k*) *Metropolitan Board of Works* v. *McCarthy* (1874), L. R. 7 H. L. 243, at pp. 253, 256. Personal inconvenience caused by a level crossing near a house will not furnish a ground for compensation if the property itself is not depreciated in value (*Caledonian Rail. Co.* v. *Ogilvie* (1856), 2 Macq. 229, H. L.; *Wood* v. *Stourbridge Rail. Co.* (1864), 16 C. B. (N. S.) 222), nor will loss of trade or custom occasioned by a work not otherwise directly affecting the house or land in or upon which the trade has been carried on, or any right properly incident to such house or land (*Caledonian Rail. Co.* v. *Walker's Trustees, supra, per* Lord SELBORNE, L.C., at p. 276). See also *Re Harvey and London County Council* (1909), *Times*, January 19.

(*l*) *Ibid.*, and *Metropolitan Board of Works* v. *McCarthy, supra; Beckett* v. *Midland Rail. Co.* (1867), L. R. 3 C. P. 82.

(*m*) See cases cited in preceding note, and *Chamberlain* v. *West End of London and Crystal Palace Rail. Co.* (1862), 2 B. & S. 605; *R.* v. *Bristol Dock Co.* (1810), 12 East, 429. Thus, the blocking up of one of two means of access to premises, whether by river or land, may afford a ground for compensation (*Metropolitan Board of Works* v. *McCarthy, supra; Macey* v. *Metropolitan Board of Works* (1864), 33 L. J. (CH.) 377; *Wadham* v. *North Eastern Rail. Co.* (1884), 14 Q. B. D. 747, (1885) 16 Q. B. D. 227, C. A.; and compare *R.* v. *Metropolitan Board of Works* (1869), L. R. 4 Q. B. 358; *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418; *Bell* v. *Hull and Selby Rail. Co.* (1840), 6 M. & W. 699. As to the general law of access by river, see *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; *North Shore Rail. Co.* v. *Pion* (1889), 14 App. Cas. 612. As to compensation for cutting off access to the sea, see *R.* v. *Rynd* (1863), 16 I. C. L. R. 29; *A.-G. of the Straits Settlements* v. *Wemyss* (1888), 13 App. Cas. 192, at p. 196, P. C.). The rendering of the means of access to premises much less convenient, as by making it steeper (*Caledonian Rail. Co.* v. *Walker's Trustees, supra*), or of less width (*Beckett* v. *Midland Rail. Co. supra; Chamberlain* v. *West End of London and Crystal Palace Rail. Co.* (1862), 2 B. & S. 605), the stopping up of a highway from being a thoroughfare and the substitution of a new highway (*Metropolitan Board of Works* v. *Howard* (1889), 5 T. L. R. 732, H. L.), the alteration of the level of a street so as to make the access to a house dangerous or inconvenient (*R.* v. *Wallasey Local Board* (1869), L. R. 4 Q. B. 351; *R.* v. *St. Luke's, Chelsea* (1871), L. R. 7 Q. B. 148, Ex. Ch.; *Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595; and see *R.* v. *Eastern Counties Rail. Co.* (1841), 2 Q. B. 347; *Moore* v. *Great Southern and Western Rail. Co.* (1859), 10 I. C. L. R.

Easements.

The interference with any private right appurtenant to property will upon the above rule afford a ground of compensation when the value of the property is thereby reduced. The obstruction of easements, such as rights of way (*n*), of light (*o*), and of support (*p*), will therefore entitle the owner of the dominant tenement to compensation for any loss he may thereby suffer (*q*).

Restrictive covenants.

50. If land taken or used by promoters has been subject to restrictive covenants for the benefit of other land, the breach of such a covenant by the promoters will confer upon the owner of that other land a right to compensation for injurious affection (*r*). If acts done by promoters prevent covenants relating to land from being carried out, the promoters will be liable in respect thereof (*s*).

46; *Tuohey* v. *Great Southern and Western Rail. Co.* (1859), 10 I. C. L. R. 98; *Re McMullen and Ulster Rail. Co.* (1863), Ir. Reserved Cas. 35), would each afford a ground for compensation if the value of the premises for all purposes was thereby diminished.

(*n*) *Glover* v. *North Staffordshire Rail. Co.* (1851), 16 Q. B. 912; *Furness Rail. Co.* v. *Cumberland Co-operative Building Society* (1884), 52 L. T. 144, H. L.; *Ford* v. *Metropolitan and Metropolitan District Rail. Cos.* (1886), 17 Q. B. D. 12, C. A.; *Barnard* v. *Great Western Rail. Co.* (1902), 86 L. T. 798; *London School Board* v. *Smith*, [1895] W. N. 37. As to blocking up access to a ferry, see *R.* v. *Great Northern Rail. Co.* (1849), 14 Q. B. 25.

(*o*) *Eagle* v. *Charing Cross Rail. Co.* (1860), L. R. 2 C. P. 638; *Clark* v. *London School Board* (1874), 9 Ch. App. 120; *R.* v. *Poulter* (1887), 20 Q. B. D. 132, C. A.; *Wigram* v. *Fryer* (1887), 36 Ch. D. 87; *Re London, Tilbury etc. Rail. Co. and Gower's Walk Schools (Trustees)* (1889), 24 Q. B. D. 326, C. A.; *Courage & Co.* v. *South Eastern Rail. Co.* (1902), 19 T. L. R. 61; *Emsley* v. *North Eastern Rail. Co.*, [1896] 1 Ch. 418, C. A.

(*p*) See *Metropolitan Board of Works* v. *Metropolitan Rail. Co.* (1868), L. R. 3 C. P. 612, (1869) L. R. 4 C. P. 192, Ex. Ch., explained in *Roderick* v. *Aston Local Board* (1877), 5 Ch. D. 332, C. A.

(*q*) Riparian owners will be likewise entitled to compensation for interference with the natural flow of water (*R.* v. *Nottingham Old Waterworks Co.* (1837), 6 Ad. & El. 355), as where part of the water is diverted, but where the whole of a stream is appropriated for waterworks under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), it is deemed to be a taking, and not merely an injurious affection (*Ferrand* v. *Bradford Corporation* (1856), 21 Beav. 412; *Bush* v. *Trowbridge Waterworks Co.* (1875), 10 Ch. App. 459; *Stone* v. *Yeovil Corporation* (1876), 2 C. P. D. 99, C. A.; *Page* v. *Kettering Waterworks Co.* (1892), 8 T. L. R. 228; and see *Stainton* v. *Woolrych*, *Stainton* v. *Metropolitan Board of Works and Lewisham District Board of Works* (1857) 26 L. J. (CH.) 300; and see p. 156, *post*). As to the occasional flooding of lands due to the proper execution of the works, see *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212, at p. 227.

(*r*) *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437, C. A.; *Long Eaton Recreation Grounds Co.* v. *Midland Rail. Co.*, [1902] 2 K. B. 574, C. A. Compare *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180, at p. 189. Thus, if land taken has been subject to a covenant restricting the class of buildings which may be erected, the erection by promoters of a different class will render them liable to pay compensation to the covenantee, and so will the breach by them of the covenant against carrying on a noisy and offensive trade (*Long Eaton Recreation Grounds Co.* v. *Midland Rail. Co.*, *supra*), or of a covenant for quiet enjoyment (*Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Anderson*, [1898] 2 Ch. 394, p. 401, C. A.).

(*s*) *Furness Rail. Co.* v. *Cumberland Co-operative Building Society* (1884), 52 L. T. 144, H. L., a case as to the duty to lay out streets; and see *Re Masters and Great Western Rail. Co.*, [1901] 2 K. B. 84, C. A. As to the duty of the promoters to enter into a covenant to indemnify the lessee against breaches, see *Harding* v. *Metropolitan Rail. Co.* (1872), 7 Ch. App. 72. As to the effect of taking part of land let on a building agreement, see *Re Furness and Willesden Urban District Council* (1905), 70 J. P. 25.

SECT. 3. Compensation for Injurious Affection.

Other rights over land, such as rent-charges, rights of common, and the like, are the subject of special statutory provisions (*t*).

Injury must arise from construction of works.

51. Another condition necessary to entitle a person to recover compensation for injurious affection caused by works on lands not acquired from him is that the damage must arise from the construction of the works, and not from their authorised user (*u*). Thus, if a house near a railway is depreciated in value by reason of the vibration caused by trains passing, the owner will not be entitled to recover compensation for such depreciation if no part of the owner's land has been taken for the railway (*a*). If part of the claimant's land is taken for the purpose of an undertaking, but the use complained of as injurious is not on the land so taken, no compensation is recoverable (*b*).

Special provisions.

52. Certain special Acts, or Acts incorporated therewith, contain provisions varying the last-mentioned condition. Under the Waterworks Clauses Act, 1847 (*c*), promoters for the purpose of constructing and supplying waterworks are required to make compensation to all persons interested in lands or streams injuriously affected by the maintenance as well as by the construction of the works (*d*). In Acts authorising underground railways in London a clause providing for compensation for injurious affection by reason of vibration caused by the working of the railway is now inserted, and clauses with a similar object are commonly inserted in special Acts for the protection of individual owners (*e*).

(*t*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 99—107, 115—118; and see pp. 135 *et seq.*, *post*. As to sporting rights, see *Bird* v. *Great Eastern Rail. Co.* (1865), 34 L. J. (C. P.) 366, and *Webber* v. *Lee* (1882), 9 Q. B. D. 315, C. A.

(*u*) *Hammersmith etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; *R.* v. *Pease* (1832), 4 B. & Ad. 30; *Vaughan* v. *Taff Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch.; *London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45, being cases as to damage caused from the working or carrying on of railways. As to works authorised under the Public Health Act, 1875 (38 & 39 Vict. c. 55), see *Cowper-Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153, *per* Lord HALSBURY, at p. 161, *per* Lord WATSON, at p. 164; as to electric undertakings, see *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A.; and see *Canadian Pacific Rail.* v. *Roy*, [1902] A. C. 220, P. C.

(*a*) *Hammersmith etc. Rail. Co.* v. *Brand*, *supra*; *Re Penny and South Eastern Rail. Co.* (1857), 7 E. & B. 660. As to noise and smoke, see *A.-G.* v. *Metropolitan Rail. Co.*, [1894] 1 Q. B. 384, C. A.; *Caledonian Rail. Co.* v. *Ogilvie* (1856), 2 Macq. 229, H. L. Injury to the trade of a ferry by the opening and use of a footbridge constructed under statutory powers affords no ground for compensation (*Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224, C. A. overruling *R.* v. *Cambrian Rail. Co.* (1871), L. R. 6 Q. B. 422). As to the rights of the owner of a ferry in respect of a bridge built near it, see *Dibden* v. *Skirrow*, [1908] 1 Ch. 41, C. A.

(*b*) *City of Glasgow Union Rail. Co.* v. *Hunter* (1870), L. R. 2 Sc. & Div. 78; *Caledonian Rail. Co.* v. *Ogilvie*, *supra*; and see *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (1872), L. R. 5 H. L. 418, *per* Lord CHELMSFORD, at p. 458, and *Cowper-Essex* v. *Acton Local Board*, *supra*, *per* Lord WATSON, at p. 166. See this more fully discussed p. 42, *ante*.

(*c*) 10 & 11 Vict. c. 17.

(*d*) *Ibid.*, ss. 6, 12. Promoters have therefore been held liable to pay compensation in respect of injuries caused to a house by reason of the support being removed by the abstraction of running silt caused by pumping from a well on adjoining land (*Fletcher* v. *Birkenhead Corporation*, [1907] 1 K. B. 205, C. A.).

(*e*) See, for example, *London and North Western Rail. Co.* v. *Reddaway* (1907),

SUB-SECT. 2.—*The Measure of Compensation.*

SECT. 3. Compensation for Injurious Affection.

53. If the right to compensation is established, the amount of compensation is commonly determined by the ordinary rules applicable to damages in actions of tort (*f*). Injuries to goods and to personal interests may be included, if such damage can be in some way annexed to the compensation for an injury to land (*g*). If the property is depreciated in value for all purposes, the compensation will be based on the depreciation of the market value of the property in its existing state (*h*). When under a statute a person is entitled to full compensation for all damage, the amount of compensation, once the right to it is established, may properly include a sum for damage caused by acts in themselves legal, but which could not have been committed had there been no interference with the claimant's legal rights (*i*).

Measure of compensation

Part IV.—Compensation for Mines and Minerals.

SECT. 1.—*Special Clauses as to Mines.*

54. A series of clauses relating to mines lying under or near railways are incorporated in special Acts passed since the 8th May, 1845, which authorise the making of railways (*k*). These clauses

Mines under railways etc.

23 T. L. R. 279. In many special Acts the remedy by law is preserved in respect of causes of action due to carrying on of the works. See, for example, Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 29, and Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 332, which latter Act provides that local authorities may not injuriously affect rivers, streams, canals etc., as to which see *R.* v. *Darlington Local Board of Health* (1864), 33 L. J. (Q. B.) 305; *Roberts* v. *Gwyrfai Rural District Council*, [1899] 2 Ch. 608, C. A. As regards electric works, see *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, at p. 320, C. A.

(*f*) *Re London, Tilbury, and Southend Rail. Co. and Gower's Walk Schools (Trustees)* (1889), 24 Q. B. D. 326, *per* Lord ESHER, at p. 329, C. A.; *Re Clarke and Wandsworth Board of Works* (1868), 17 L. T. 549. Compare *R.* v. *Thames and Isis Navigation Commissioners* (1836), 5 Ad. & El. 804; and see title DAMAGES.

(*g*) *Hammersmith etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171, at p. 198; *Knock* v. *Metropolitan Rail. Co.* (1868), L. R. 4 C. P. 131.

(*h*) *Beckett* v. *Midland Rail. Co.* (1867), L. R. 3 C. P. 82, at p. 95; *Wadham* v. *North Eastern Rail. Co.* (1884), 14 Q. B. D. 747, (1885) 16 Q. B. D. 227, C. A.; and see *Metropolitan Board of Works* v. *Howard* (1889), 5 T. L. R. 732, H. L.

(*i*) *Re London, Tilbury, and Southend Rail. Co. and Gower's Walk Schools (Trustees)*, *supra*. In that case a railway company had erected a warehouse which obstructed some ancient lights of the claimants and also some other lights in respect of which no right existed, which latter could not have been interfered with but for the interference with the former: the company were held liable to pay for all the damage occasioned to the property. See *Horton* v. *Colwyn Bay and Colwyn District Council*, [1907] 1 K. B. 14, *per* BIGHAM, J., at pp. 22, 23; on appeal [1908] 1 K. B. 327. Such measure of compensation may be given by express enactment. See Railway Fires Act, 1905 (5 Edw. 7, c. 11), s. 2 (3). As to meaning of full compensation in relation to costs, see *Barnett* v. *Eccles Corporation*, [1900] 2 Q. B. 423, C. A.

(*k*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77—85. The

SECT. 1. Special Clauses as to Mines.

are also incorporated in Acts relating to various other matters (*l*). There is also another and very similar group of clauses, in regard to mines lying under or near waterworks, incorporated in Acts relating to waterworks passed after the 23rd April, 1847 (*m*). These latter, with necessary modifications, were in 1883 made applicable to sanitary works executed by sanitary authorities as defined by the Public Health Act, 1875 (*n*), the expression "sanitary works" meaning works of sewerage and drainage, sewage disposal, lighting, or water supply, and including any fixtures, pipes, fittings or apparatus connected with any such work and belonging to or used by the authority (*o*). These provisions are to be regarded as statutory codes as to the relative rights of mine-owners and companies where lands are compulsorily taken under Acts incorporating these sections, and are in substitution for the common law (*p*).

Sanitary works.

SECT. 2.—*Purchase of the Minerals.*

Minerals do not pass with lands.

55. According to these provisions, the promoters are not entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, are deemed to be excepted out of the conveyance of such lands, unless they are expressly named therein and conveyed thereby (*q*).

Required minerals to be purchased.

If all or some of the minerals underneath the land to be taken are required for the purposes of the undertaking, as for support, they may be purchased with the land, or subsequently within the time limited for compulsory purchase (*r*). If they are so purchased,

application of these clauses relating to mines may be expressly excluded (*London and North Western Rail. Co.* v. *Walker*, [1903] A. C. 289).

(*l*) *E.g.*, Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), Sched. I., Part I. (1). See titles ALLOTMENTS, Vol. I., p. 331; SMALL HOLDINGS. As to mines and minerals generally, see title MINES, MINERALS AND QUARRIES.

(*m*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 18—27.

(*n*) 38 & 39 Vict. c. 55, amended as regards sanitary authorities by the Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*o*) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37). The Act confers no right to compensation where the right to support has been acquired before the passing of the Act (*ibid.*, s. 5; and *Jary* v. *Barnsley Corporation*, [1907] 2 Ch. 600).

(*p*) *Great Western Rail. Co.* v. *Bennett* (1867), L. R. 2 H. L. 27; *Holliday* v. *Wakefield Corporation*, [1891] A. C. 81; *Re Gerard (Lord) and London and North Western Rail. Co.*, [1895] 1 Q. B. 459, C. A. If the mines and minerals under the land are purchased by agreement on a voluntary sale, the common law rights as to support will apply (*Manchester Corporation* v. *New Moss Colliery Co., Ltd.*, [1906] 2 Ch. 564, C. A.; [1908] A. C. 117).

(*q*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 77; Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 18. If a railway company purchase the surface from a person having the surface only, but with a right of support, they will not acquire that right unless expressly conveyed. See *Pountney* v. *Clayton* (1883), 11 Q. B. D. 820, *per* BOWEN, L.J., at pp. 840 *et seq.*, C. A.

(*r*) *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559, C. A. As to purchasing some only of the minerals see *Re Gerard (Lord) and London and North Western Rail. Co.*, *supra*. The minerals may also be purchased subsequently by agreement (*Thompson* v. *Hickman*, [1907] 1 Ch. 550).

the persons interested will be entitled to be paid compensation in respect thereof in the usual way, the value of the mine with all its potentialities being included (*s*); but in assessing that compensation the amount payable for injurious affection, severance, and prospective damage will not be governed by the ordinary rules, but will be subject to the statutory code, the effect of which is to postpone the rights of the mine-owner until there is an actual or imminent interference with his mining operations (*t*). Minerals dug up and used in the construction of the works must also be paid for, but such digging up is no evidence of the promoters' intention to purchase all the minerals under the surface (*u*).

Injury to mines.

When the surface only is purchased, the compensation, so far as it relates to the severance of the land from the mines or other injurious affection thereof, will in the same way be governed by the statutory code and postponed until the damage occurs. If, however, injury be done to works connected with mining operations, which is directly and immediately occasioned by the taking of the surface or of interests in the surface, or by the purchase of the minerals, the mine-owner will be entitled to have compensation made to him at the same time as the value of his interest in the surface or in the minerals is ascertained (*x*).

SECT. 3.—*Minerals not purchased.*

SUB-SECT. 1.—*Notice of Intention to work, and Counter-notice.*

Notice to work minerals.

56. If the owner, lessee, or occupier of any mines or minerals lying under the undertaking, or within the distance prescribed by the special Act, or where no distance is prescribed within forty yards therefrom (*a*), be *bonâ fide* desirous of working the same, such owner, lessee, or occupier is required to give to the promoters notice in writing of his intention so to do (*b*) thirty days before the commencement of working; and upon the receipt of the notice the promoters may cause such mines to be inspected, and if it appears to them that the working of such mines or minerals is likely to do damage to the works of the undertaking, and if they are willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same (*c*).

(*s*) *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ltd.* v. *Pontypridd Waterworks Co.*, [1903] A. C. 426, *per* Lord HALSBURY, at p. 428.

(*t*) *Holliday* v. *Wakefield Corporation*, [1891] A. C. 81.

(*u*) *Re Huddersfield Corporation and Jacomb* (1874), 10 Ch. App. 92.

(*x*) *Holliday* v. *Wakefield Corporation, supra, per* Lord WATSON, at pp. 97, 98; *Whitehouse* v. *Wolverhampton Rail. Co.* (1869), L. R. 5 Exch. 6, where it was held that the immediate necessity of sinking a new pit outside the land taken in place of one in the land taken would found a claim for compensation.

(*a*) As to mines outside this limit the common law will regulate the rights of the parties (*New Moss Colliery Co., Ltd.* v. *Manchester Corporation*, [1908] A. C. 117; *Elliot* v. *North Eastern Rail. Co.* (1863), 32 L. J. (CH.) 402, H. L.; *Midland Rail. Co.* v. *Checkley* (1867), L. R. 4 Eq. 19).

(*b*) For form of notice by mine-owner to railway company of intention to work coal, see Encyclopædia of Forms, Vol. VIII., p. 125.

(*c*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 78. S. 22 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), is practically the same, save that the promoters must have deposited plans of underground works,

SECT. 3. **Minerals not purchased.**

Counter-notice.

On receipt of a notice from the promoters (*d*) stating their willingness to treat with such owner, lessee, or occupier for the payment of compensation as to all or part of the said minerals, the working of so much of them as is mentioned in the notice must be stopped, not only by the person served with the notice, but by all other persons having interests in the minerals, and thereupon they will all become entitled to compensation according to their interests (*e*).

Effect of no counter-notice.

If the promoters do not give such notice within thirty days, the mines, or that part of them to which such notice, when given, does not refer, may be worked in a proper manner and according to the usual manner of working such mines in the district (*f*), whether it be by surface operations or underground workings (*g*), although the effect may be to damage or destroy the undertaking, as by removing the support (*h*). The promoters may, however, stop the working at any time by giving the statutory notice (*i*).

SUB-SECT. 2.—*Mining Communications.*

Making and maintaining communications.

57. When the working of the mines is stopped by such a notice, the owners, lessees, and occupiers thereof, whose mines extend so

otherwise the mine-owner need not give notice (*South Staffordshire Waterworks Co.* v. *R. Mason & Sons* (1886), 56 L. J. (Q. B.) 255). Under the Public Health (Support of Sewers) Act, 1883 (46 & 47 Vict. c. 37), s. 3, the local authority may specify the extent of support they require to be left, which may extend beyond the limit of forty yards. The person to give the notice is the person who at the time of giving the notice is entitled to work the mine either by himself or by lessees or licensees (*Smith* v. *Great Western Rail. Co.* (1877), 3 App. Cas. 165), and the desire must be real and genuine (*Midland Rail. Co. and Kettering, Thrapston, and Huntingdon Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19, at p. 32; *Dixon* v. *Caledonian and Glasgow and South Western Rail. Cos.* (1880), 5 App. Cas. 820, at p. 839). It is for the promoters to decide as to whether or not the working of the mines will damage the undertaking, and if they act *bonâ fide* their decision will not be upset (*Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559, C. A.).

(*d*) For form of notice of willingness to pay compensation, see Encyclopædia of Forms, Vol. VIII., p. 126.

(*e*) *Smith* v. *Great Western Rail. Co., supra;* and Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 6, and Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 6, which sections provide that full compensation must be made for all damage sustained by every person interested by reason of the exercise of the powers of the special Act and Acts incorporated therewith. As to the effect of such notice, see also *Edinburgh and District Water Trustees* v. *Clippen's Oil Co.* (1902), 87 L. T. 275, H. L. A person having a right to sink a shaft in land has such an interest as entitles him to be compensated (*Re Masters and Great Western Rail. Co.*, [1901] 2 K. B. 84, C. A.).

(*f*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 79; Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 23.

(*g*) *Great Western Rail. Co.* v. *Bennett* (1867), L. R. 2 H. L. 27; *Fletcher* v. *Great Western Rail. Co.* (1860), 29 L. J. (EX.) 253, Ex. Ch.; *Midland Rail. Co. and Kettering, Thrapston, and Huntingdon Rail Co.* v. *Robinson, supra; Midland Rail. Co.* v. *Haunchwood Brick and Tile Co.* (1882), 20 Ch. D. 552; *Midland Rail. Co.* v. *Miles* (1886), 33 Ch. D. 632; and see also *Re Gerard (Lord) and London and North Western Rail. Co.*, [1895] 1 Q. B. 459, C. A., a case where part of the materials had been purchased; and *London and North Western Rail. Co.* v. *Ackroyd* (1862), 31 L. J. (CH.) 588, where the landowner had sold only a right to make a tunnel.

(*h*) *Ruabon Brick and Terra Cotta Co.* v. *Great Western Rail. Co.*, [1893] 1 Ch. 427, C. A.

(*i*) *Dixon* v. *Caledonian and Glasgow and South Western Rail. Cos., supra.*

SECT. 3. Minerals not purchased.

as to lie on both sides of the works of the promoters, are authorised to make certain air-ways and mining communications (*k*), but the promoters are required, unless they have otherwise agreed, from time to time to pay to the owner, lessee, or occupier of any such mines or minerals such additional expenses and losses as are incurred by reason of the severance of the lands lying over such mines and minerals by the working of the undertaking, or of the continuous working of such mines or minerals being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway when the work is a railway, or under the restrictions contained in the special Act and the Acts incorporated therewith when it relates to other works, and also for any minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the works of the undertaking, and, in cases other than railways, by reason of apprehended injury to the works of the undertaking from the working thereof (*l*).

Waterworks etc.

In the case of waterworks and sanitary works it is also provided that nothing in the special Act, or in the incorporated Acts, shall prevent the undertakers from being liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means, or in consequence, of the works, in case the same had not been constructed or maintained by virtue of the special Act and the incorporated Acts (*m*).

Railways.

In the case of railways, if any loss or damage is sustained by the owner or occupier of the lands lying over any such mines, the working whereof shall have been so prevented (and not being the owner, lessee, or occupier of such mines), by reason of the making of air-ways and other mining communications which would not have been necessary to be made but for the working of such mines having been prevented, the company must make full compensation to such owner or occupier of the surface lands for the loss or damage so sustained by him (*n*).

SUB-SECT. 3.—*Compensation when Working stopped.*

Compensation for stoppage.

58. When the notice to stop working minerals is given, and the parties do not agree as to the amount of compensation, it is to be settled as in other cases of disputed compensation, that is to say, in manner provided by the Lands Clauses Acts (*o*). The compensation

(*k*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 80; Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 24.

(*l*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 81; Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 25. As to the meaning of the term "apprehended injury" in the latter section, see *Holliday* v. *Wakefield Corporation*, [1891] A. C. 81.

(*m*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 27, as to waterworks; Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 3, as to sanitary works. As to the effect of this section, see *Holliday* v. *Wakefield Corporation*, *supra*, at pp. 90, 100.

(*n*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 82.

(*o*) *Ibid.*, s. 78; Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 22; and *R.* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 512, at p. 519. For procedure see Part VII., p. 76, *post*.

SECT. 3. **Minerals not purchased.**

for additional expenses and losses caused by severance is to be settled by arbitration from time to time as it arises (*p*). If the two classes of damage are directly and immediately occasioned by the taking of the surface or by the stoppage, the mine-owner may have the compensation for both assessed at the same time (*q*).

Measure of compensation.

When the promoters of the undertaking give notice requiring the minerals to be left unworked, they do not thereby purchase or agree to purchase them. They merely agree to pay compensation for the damage caused by the mineral being left unworked, and, in determining the amount of that compensation, the inquiry to be made is not what is the value of the mine, or of the mineral, but what would the mine-owner, if he had not been prohibited, have made out of the mineral during the time it would have taken him to get it (*r*). One effect of this is that if the inquiry takes place some time after the notice is given, all unexpected and unforeseen alterations in the price of the mineral, which have taken place in the interval, may properly be taken into account in assessing the compensation (*s*), and another effect is that interest is not payable on the amount of the compensation from the date of the notice if the inquiry is delayed (*t*), although it would be payable if the notice implied a purchase of the mines (*a*).

The compensation payable for the interruption of the continuous working of mines is the additional expenses and losses incurred, but they need not be actually incurred at the time, provided they are imminent, and capable of being immediately estimated with reasonable certainty (*b*).

Leased mines.

In applying this principle to mines let on lease, the total sum payable is the full value of the mineral, less the cost of getting it, or, in other words, the profit on sale and royalties which would have been made out of the mineral which the lessee was

(*p*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 81. In the case of railways the arbitration is governed by the clauses relating to arbitration in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), namely, ss. 126—137. In the case of waterworks and sanitary works, the arbitration is governed by the Lands Clauses Acts. See Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 25.

(*q*) *Holliday* v. *Wakefield Corporation*, [1891] A. C. 81, at p. 98. The assessment in such a case would take place under the Lands Clauses Acts (*R.* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 512).

(*r*) *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ltd.* v. *Pontypridd Waterworks Co.*, [1903] A. C. 426; *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559, at pp. 570, 575, C. A.; *Great Northern Rail. Co.* v. *Commissioners of Inland Revenue*, [1901] 1 K. B. 416, C. A.

(*s*) *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ltd.* v. *Pontypridd Waterworks Co.*, *supra*.

(*t*) *Re Richard and Great Western Rail. Co.*, [1905] 1 K. B. 68, C. A.

(*a*) *Fletcher* v. *Lancashire and Yorkshire Rail. Co.*, [1902] 1 Ch. 901, following the principle laid down in *Birch* v. *Joy* (1852), 3 H. L. Cas. 565.

(*b*) *Whitehouse* v. *Wolverhampton and Walsall Rail. Co.* (1869), L. R. 5 Exch. 6. And see *Cromford Canal Co.* v. *Cutts* (1848), 5 Ry. & Can. Cas. 442; *Rex* v. *Leeds and Selby Rail Co.* (1835), 3 Ad. & El. 683. See the case first cited in this note for examples of additional expenses and losses which may be the subject of compensation; and also *Midland Rail. Co.* v. *Miles* (1885), 30 Ch. D. 634, and (1886) 33 Ch. D. 632; *Holliday* v. *Wakefield Corporation*, *supra*. For form of receipt by colliery company for compensation, see Encyclopædia of Forms, Vol. VIII., p. 126; and for form of agreement by lessee of colliery for leaving mine *in situ* for support of railway, see *ibid.*, p. 128.

prevented from working. The promoters are not entitled to a reduction of this sum on the ground that there are other parts of the same mine which the lessee could work, although less profitably, and that he could not exhaust the minerals within the term of his lease. The lessor's compensation, also, is not to be based on the difference in the value of his reversion before and after giving the notice (*c*).

SECT. 3. Minerals not purchased.

SUB-SECT. 4.—*Meaning of "Mines" and "Minerals."*

59. Questions of considerable difficulty have arisen as to what are "mines" and "minerals" within the meaning of the above clauses. The method of getting the mineral does not supply any criterion—it may be by surface digging, as in the case of limestone (*d*), by quarrying (*e*), or by underground working (*f*). Clay may be a mineral, but where it forms the surface or sub-soil of the land sold it is not a mineral within the meaning of the statutory provisions (*g*).

Meaning of "mines" and "minerals."

SECT. 4.—*Other Statutory Provisions.*

60. Before the passing of the statutory codes to which reference has been made, special provisions dealing with mines were inserted in special Acts, as, for example, in those authorising the construction of canals. These provisions varied somewhat in their terms, and regard must be had to the provisions of each particular Act to determine the rights of the parties as to compensation, and the right of support (*h*). In some cases, for example, the owner was required

Special provisions as to mines.

(*c*) *Eden* v. *North Eastern Rail. Co.*, [1907] A. C. 400. In this case the lessees were awarded the full profit they would have made if they had worked the coal and the lessor was awarded the amount of the royalty to which he would have been entitled. The figures were mostly agreed. And see also *Smith* v. *Great Western Rail. Co.* (1877), 3 App. Cas. 165, *per* Lord PENZANCE, at p. 185; *Rugby Portland Cement Co.* v. *London and North Western Rail. Co.*, [1908] 2 K. B. 606, C. A.

(*d*) *Midland Rail. Co. and Kettering, Thrapston, and Huntingdon Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19; *Midland Rail. Co.* v. *Haunchwood Brick and Tile Co.* (1882), 20 Ch. D. 552; *Dixon* v. *Caledonian and Glasgow and South Western Rail. Cos.* (1880), 5 App. Cas. 820; *Ruabon Brick and Terra Cotta Co.* v. *Great Western Rail. Co.*, [1893] 1 Ch. 427 C. A.

(*e*) *Midland Rail. Co.* v. *Checkley* (1867), L. R. 4 Eq. 19; and see *Jamieson* v. *North British Rail. Co.* (1868), 6 Sc. L. R. 188.

(*f*) *Midland Rail. Co. and Kettering, Thrapston, and Huntingdon Rail. Co.* v. *Robinson, supra*, at pp. 28, 34; and see title MINES, MINERALS AND QUARRIES.

(*g*) *Glasgow Corporation* v. *Farie* (1888), 13 App. Cas. 657; *Great Western Rail. Co.* v. *Blades*, [1901] 2 Ch. 624; *Re Todd, Birleston & Co. and North Eastern Rail. Co.*, [1903] 1 K. B. 603, C. A.; *Great Western Rail. Co.* v. *Carpalla United China Clay Co.* (1908), 72 J. P. 457, affirmed in C. A., 73 J. P. 23; and see *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1882), 22 Ch. D. 25, C. A., on appeal on another point (1884), 9 App. Cas. 480; and *Re Metropolitan Rail. Co. and Cotton's Trustees* (1881), 45 L. T. 103, C. A.

(*h*) See, for example, *Knowles & Sons* v. *Lancashire and Yorkshire Rail. Co.* (1889), 14 App. Cas. 248; *Dudley Canal Navigation Co.* v. *Grazebrook* (1830), 1 B. & Ad. 59; *Cromford Canal Co.* v. *Cutts* (1848), 5 Ry. & Can. Cas. 442; *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch.; *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] A. C. 564; *New Moss Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1897] 1 Ch. 725; *Elliot* v. *North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333; *London and North Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16, C. A.; *Wyrley Canal Co.* v. *Bradley* (1806), 7 East, 368; *Glamorganshire Canal Navigation Co.* v. *Nixon's Navigation Co.*

SECT. 4. Other Statutory Provisions.

to sell his land with a reservation of the minerals. Where that was so, the owner has been held to have impliedly sold a right of subjacent and adjacent support to the undertaking, so that his future working of the minerals would be subject to that right, and this ought to be included in the compensation originally paid (*i*).

General principle.

There are other cases of statutory undertakings, where there has been no special provision in regard to mines in and near the undertaking. Gas mains (*k*), tramways (*l*), water mains laid before 1845 (*m*), and sewers before 1883 (*n*), afford examples. The general principle applicable to such cases is that where an express statutory right is given to maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make and maintain it, but this will not necessarily be inferred if there is in the statute no provision for giving the owner compensation for imposing this burden upon his land (*o*). If compensation can be obtained, this burden will be deemed to be imposed, and in assessing the compensation it ought to be taken into consideration (*p*), and no claim can afterwards be made in respect of it when it is desired to work the minerals (*q*).

Part V.—Procedure to acquire Land by Agreement.

SECT. 1.—*Powers of Purchase and Sale.*

Purchase by agreement.

61. Under the Lands Clauses Acts, provision (*r*) is made for the purchase by agreement by the promoters of the undertaking of any lands or parts thereof authorised to be taken by the special Act,

(1901), 85 L. T. 53, C. A.; *London and North Western Rail. Co.* v. *Walker*, [1903] A. C. 289; *North Eastern Rail. Co.* v. *Crosland* (1862), 32 L. J. (CH.) 353, C. A.

(*i*) *Caledonian Rail. Co.* v. *Sprot* (1856), 2 Macq. 449, H. L.; *Elliot* v. *North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333; *London and North Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16, at p. 27, C. A.

(*k*) *E.g.*, *Normanton Gas Co.* v. *Pope & Pearson, Ltd.* (1883), 52 L. J. (Q. B.) 629, C. A.

(*l*) *Great Western Rail. Co.* v. *Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157.

(*m*) *Clippen's Oil Co.* v. *Edinburgh and District Water Trustees*, [1904] A. C. 64.

(*n*) *Re Dudley Corporation and Dudley's (Earl) Trustees* (1881), 8 Q. B. D. 86, C. A.

(*o*) *London and North Western Rail. Co.* v. *Evans*, *supra*, at p. 28, C. A., approved in *Clippen's Oil Co.* v. *Edinburgh and District Water Trustees*, *supra*; *Re Dudley Corporation and Dudley's (Earl) Trustees*, *supra*, at p. 93, C. A.; *Benfieldside Local Board* v. *Consett Iron Co.* (1877), 3 Ex. D. 54.

(*p*) *Re Dudley Corporation and Dudley's (Earl) Trustees*, *supra*; *Normanton Gas Co.* v. *Pope & Pearson, Ltd.*, *supra*. For an example of a case where no compensation was given and in consequence no burden of support was held to be imposed, see *Metropolitan Board of Works* v. *Metropolitan Rail. Co.* (1868), L. R. 3 C. P. 612, (1869) L. R. 4 C. P. 192, Ex Ch., explained in *Roderick* v. *Aston Local Board* (1877), 5 Ch. D., *per* JESSEL, M.R., p. 332, C. A.

(*q*) *Great Western Rail. Co.* v. *Cefn Cribbwr Brick Co.*, *supra*.

(*r*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 6—15.

which are required for the purposes of such Act (*s*), and of all estates and interests in such lands of what kind soever (*t*). The agreement must be for an absolute purchase of the land (*t*), but where the owner is able and willing to sell an easement or right of use, and such right is sufficient for all purposes sanctioned by the special Act, the parties may agree for the sale of such a limited right (*a*).

Who may sell.

The persons with whom the promoters may agree to purchase such lands are the owners, and all persons having any estate or interest therein, or all parties under incapacity to sell, but who by the special Act or the Lands Clauses Acts are enabled to sell and convey (*t*).

Limited owners.

Under the Lands Clauses Acts, all parties who are seised, possessed of, or entitled to any such lands (*b*), or any estate or interest therein, are authorised to sell and convey and release the same to the promoters, and to enter into all necessary agreements for that purpose, and particularly all corporations, tenants in tail or for life, married women seised in their own right (*c*) or entitled to dower, guardians, committees of lunatics and idiots (*d*), trustees or feoffees in trust for charitable or other purposes (*e*), executors and administrators, and all parties for the time being entitled to the receipt of the rents and profits (*f*) of any such lands in possession

(*s*) As to what lands are authorised to be taken and what are required for the purposes of the undertaking, see *ante*, pp. 22, 23. Ss. 6—15 are frequently incorporated in Acts, although no land is authorised to be taken but authority is merely given to purchase land. See, for example, Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 12.

(*t*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 6.

(*a*) *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, at p. 801. Express provision for the sale of easements is now commonly inserted in local and personal Acts, and also in general Acts authorising the making of provisional orders, *e.g.*, Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 23; and see next note. For forms of agreement for sale of freeholds, see Encyclopædia of Forms, Vol. VIII., pp. 76, 80.

(*b*) Where the special Act authorises persons empowered to sell and release lands to grant easements, persons, such as executors, with merely a power of sale, will not be able to do so, as they are not seised, possessed or entitled to land (*Re Barrow-in-Furness Corporation and Rawlinson's Contract*, [1903] 1 Ch. 339.

(*c*) *E.g.*, *Cooper* v. *Gostling* (1863), 4 Giff. 449. Married women absolutely entitled to an interest in land for their separate use are the proper parties to sell under the Act, and not the trustees of the settlement (*Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429, C. A.).

(*d*) The sanction of the court is also required (*Re Taylor* (1849), 1 Mac. & G. 210; *Re Brewer* (1875), 1 Ch. D. 409, C. A.). Persons of unsound mind not so found are not authorised to sell, nor are persons on their behalf (*Re Tugwell* (1884), 27 Ch. D. 309).

(*e*) As to when the sale may be by trustees and when by the *cestui que trust*, see *Re Piggott and Great Western Rail. Co.* (1881), 18 Ch. D. 146; *Peters* v. *Lewes and East Grinstead Rail. Co.*, *supra*; *Lippincott* v. *Smyth* (1860), 29 L. J. (CH.) 520; *Hall* v. *London, Chatham and Dover Rail. Co.* (1866), 14 L. T 351. As to trustees for charitable purposes, see *St. Thomas's Hospital (Governors)* v. *Charing Cross Rail. Co.* (1861), 30 L. J. (CH.) 395; *Grosvenor* v. *Hampstead Junction Rail. Co.* (1857), 26 L. J. (CH.) 731, C. A.

(*f*) As to a receiver appointed by the court, see *Tink* v. *Rundle* (1847), 10 Beav. 318.

SECT. 1. Powers of Purchase and Sale.

or subject to any estate in dower, or to any lease for life or for lives and years, or for years, or any less interest; and such power may be lawfully exercised by all such parties, other than married women entitled to dower or lessees for life, or for lives and years, or for years, or for any less interest (*g*), not only on behalf of themselves and their respective heirs, administrators, and successors, but also for and on behalf of every person entitled in reversion, remainder, or expectancy after them, or in defeasance of the estates of such parties (*h*); and as to such married women, whether they be of full age or not, as if they were not of full age, and as to such guardians, on behalf of their wards, and as to such committees, on behalf of the lunatics and idiots of whom they are the committees respectively, and that to the same extent as such wives, wards, lunatics and idiots respectively could have exercised the same power under the authority of the special and incorporated Acts if they had respectively been under no disability, and as to such trustees, executors, and administrators, on behalf of their *cestuis que trustent*, whether infants, issue unborn, lunatics, *femes couvert* or other persons, and that to the same extent as such *cestuis que trustent* respectively could have exercised the same powers under the authority of the special and incorporated Acts if they had respectively been under no disability (*i*).

Persons under disability.

Extent of power.

All the parties so enabled to sell and convey or release lands may also enfranchise copyhold lands and exercise any other power required to be exercised by the lord of any manor, pursuant to the special or incorporated Acts, and may also lawfully exercise the power to release lands from any rent-charge or incumbrance, and to agree for the apportionment of any such rent-charge or incumbrance (*k*).

Special powers of sale.

62. Many of these persons under disability have powers of sale under settlements or under other Acts, as for example, tenants for life under the Settled Land Acts (*l*), but the promoters cannot require them to sell under these other powers so as to save costs of reinvestment (*m*); and if the sale purports to be carried out under

(*g*) Lessees are thereby released from their covenants against assignment and for subsequent breaches which they are prevented from performing (*Slipper* v. *Tottenham and Hampstead Junction Rail. Co.* (1867), L. R. 4 Eq. 112; *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180; *Harding* v. *Metropolitan Rail. Co.* (1872), 7 Ch. App. 154; and see *Mills* v. *East London Union* (1872), L. R. 8 C. P. 79; *Wadham* v. *Marlowe* (1785), 8 East, 314, n.). For form of agreement for sale of leasehold land, see Encyclopædia of Forms, Vol. VIII., p. 83, for form of agreement with occupier for purchase of his interest, see *ibid.*, p. 87, and for form of receipt for compensation, *ibid.*, p. 89.

(*h*) If the reversion is in the Crown, the consent of the Crown is necessary (*Re Cuckfield Burial Board* (1854), 24 L. J. (CH.) 585).

(*i*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 7.

(*k*) *Ibid.*, s. 8. As to copyhold land and leaseholds, ss. 95—107, and ss. 115—118; and see title COPYHOLDS. For form of agreement for apportionment of rent-charge, see Encyclopædia of Forms, Vol. VIII., p. 85.

(*l*) Settled Land Act, 1882 (45 & 46 Vict. c. 38); Settled Land Act, 1884 (47 & 48 Vict. c. 18); Settled Land Acts Amendment Act, 1887 (50 & 51 Vict. c. 30); Settled Land Act, 1889 (52 & 53 Vict. c. 36); Settled Land Act, 1890 (53 & 54 Vict. c. 69).

(*m*) *Re Bentinck* (*Lady*) *and London and North Western Rail. Co.* (1895), 12 T. L. R. 100.

the Lands Clauses Acts, its validity must be determined according to their provisions independently of other powers (*n*). An agreement to purchase is not affected by the time-limit imposed on the exercise of the power of compulsory purchase (*o*).

SECT. 2.—*Consideration for the Sale.*

Consideration to be in money.

63. The consideration for the sale must be in money (*p*), but all parties empowered by the Act to sell and convey may sell either in consideration of a gross sum or of an annual rent-charge payable by the promoters of the undertaking (*q*). The yearly rents reserved on such a conveyance become charged on the tolls or rates, if any, payable under the special Act (*r*), and this is so even when the subject of the sale is only an easement (*s*). They become a first charge on the net earnings of the undertaking and have priority over the debentures (*t*). The rents may be also otherwise secured in such manner as shall be agreed between the parties (*u*), as, for example, by a charge on the land sold (*t*) or by a power of re-entry (*a*). The rents are to be paid by the promoters as they become due; and if at any time any such rents are not paid within thirty days after they so become payable and after demand thereof in writing, the person to whom any such rent shall be payable may either recover the same from the promoters of the undertaking, with costs of suit, by action of debt in any of the superior courts, or he may levy the same by distress of the goods and chattels of the promoters of the undertaking (*u*). Rails and sleepers forming the railway are not such goods and chattels (*b*).

Rent-charge.

When the purchase price or compensation is to be paid by rent-charge, there is a further proviso that the amount of such annual rent-charge shall in no case be less than a sum one fourth part

(*n*) *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429, C. A.

(*o*) *Webb* v. *Direct London and Portsmouth Rail. Co.* (1851), 9 Hare, 129, p. 140; *Worsley* v. *South Devon Rail. Co.* (1851), 16 Q. B. 539, p. 545; *Rangeley* v. *Midland Rail. Co.* (1868), 3 Ch. App. 306; *Kemp* v. *South Eastern Rail. Co.* (1872), 7 Ch. App. 364; and see p. 63, *post*.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 6.

(*q*) *Ibid.*, s. 10, amended by the Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), ss. 1—4. If the purchase is made for a rent-charge, the borrowing powers of the promoters under the special Act are to be reduced by an amount equal to twenty years' purchase of the rent-charge (*ibid.*, s. 5).

(*r*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 11; Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 4 (*Re Gerard (Lord) and Beecham's Contract*, [1894] 3 Ch. 295, C. A.).

(*s*) *Re Gerard (Lord) and Beecham's Contract, supra.*

(*t*) *Eyton* v. *Denbigh, Ruthin, and Corwen Rail. Co.* (1869), L. R. 7 Eq. 439. Compare *Jersey (Earl)* v. *Briton Ferry Floating Dock Co.* (1869), L. R. 7 Eq. 409, and see Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 4.

(*u*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 11.

(*a*) *Eyton* v. *Denbigh, Ruthin, and Corwen Rail. Co.* (1869), L. R. 7 Eq. 439; *Foster* v. *Manchester and Milford Rail. Co.* (1880), 49 L. J. (CH.) 454.

(*b*) *Turner* v. *Cameron* (1870), L. R. 5 Q. B. 306. As to taking locomotives, see *Eyton* v. *Denbigh, Ruthin, and Corwen Rail. Co., supra*; *Rickman* v. *Johns* (1868), L. R. 6 Eq. 488, at p. 491. Distress will be allowed even where an action has been commenced on behalf of all the persons having rent-charges and where a receiver has been appointed. See case last cited, and *Eyton* v. *Denbigh, Ruthin, and Corwen Rail. Co., Ex parte Price* (1868), L. R. 6 Eq. 14.

SECT. 2. Consideration for the Sale.

greater than the net annual rent received by the parties beneficially interested in such lands upon an average of the last seven years; and that a charge of 5 per cent. on the gross sum estimated or fixed as aforesaid by way of compensation for any damage that may be done to the said lands shall, in all such cases, be added to and shall form a part of the said rent-charge; and that no fine, premium, or other consideration in the nature thereof shall be paid or taken in respect of the lands so sold or damaged, other than the annual rent-charge made payable for such lands (*c*).

Consideration, how paid.

64. When the lands are to be purchased or taken from any person under any disability or incapacity, and not having power to sell or convey such lands except under the special Act or the Lands Clauses Acts, the purchase-money, annual rent-charge, or compensation to be paid, and also the compensation for any permanent damage or injury to any lands held by such persons (*d*), must not, except where the same shall have been determined by the verdict of a jury or by arbitration (*e*), or by the valuation of a surveyor appointed by two justices, in manner provided in the Lands Clauses Acts (*f*), be less than shall be determined by the valuation of two able practical surveyors, one of whom shall be nominated by the promoters and the other by the other party, who cannot, however, appoint himself (*g*), and if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices shall, upon application of either party, after notice to the other party, for that purpose nominate; and each of such two surveyors, if they agree, or if not, then the surveyor nominated by the said justices, is required to annex to the valuation a declaration in writing, subscribed by them or him, of the correctness thereof (*h*).

SECT. 3.—*Payment and Completion.*

Payment into Bank.

65. When the land is purchased under the Lands Clauses Acts from persons under disability, the purchase-money or compensation must be deposited in the Bank of England, for the benefit of the parties interested, in the manner provided in those Acts (*i*). In the case of sale for a rent-charge, such rent-charge is and remains upon and for the same uses, trusts, and purposes as those upon which the rents and profits of the land so conveyed stood settled or assured at or immediately before the conveyance thereof (*k*).

(*c*) Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 4.

(*d*) *Stone* v. *Yeovil Corporation* (1876), 2 C. P. D. 99, C. A.

(*e*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 25—57, pp. 78, 86, *post*.

(*f*) *Ibid.*, ss. 58—62, and p. 71, *post*.

(*g*) *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429, at p. 438, C. A.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 9, and Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 4. As to the necessity of such a certificate on proceedings to enforce the sale, see *Wycombe Rail. Co.* v. *Donnington Hospital* (1866), 1 Ch. App. 268; *Bridgend Gas and Water Co.* v. *Dunraven* (1885), 31 Ch. D. 219.

(*i*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 9, and as to payment into the Bank and application of the money, ss. 69—80, see pp. 109, 114, *post*.

(*k*) Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 4.

SECT. 3. Payment and Completion.

These agreements for purchase of land are governed by the general law, as, for example, in regard to formalities (*l*), time for completion (*m*), specific performance (*n*), and interest (*o*). If in these agreements the price is to be fixed by reference to an arbitrator, the provisions of the Lands Clauses Acts applicable to arbitrations, as, for example, those dealing with costs, will not apply to such references (*p*) unless it is expressly so agreed.

SECT. 4.—*Purchase for Extraordinary Purposes.*

Land taken for extraordinary purposes.

66. Persons who are enabled to sell and convey the lands authorised to be taken may also sell and convey to the promoters lands for extraordinary purposes (*q*), when the promoters are empowered by the special Act to purchase land for such purposes (*r*). The promoters may sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner, and for such considerations, and to such persons as the promoters may think fit, and may again purchase other lands for the like purposes, and afterwards sell the same, and so from time to time; but the total quantity of land to be held by the promoters at any one time for these purposes must not exceed the quantity prescribed by the special Act (*s*).

From persons under disability.

They may not purchase more than the prescribed quantity from any party under legal disability, or who would not be able to sell and convey such lands except under the powers of the Lands Clauses Acts and the special Act; and if they purchase the said quantity from any party under such legal disability, and afterwards sell the whole or any part of the land so purchased, any party being under legal disability may not sell to the promoters any other lands in lieu of the lands so sold or disposed of by them (*t*).

Municipal corporations.

Nothing, however, in the Lands Clauses Acts or the special Act can enable any municipal corporation to sell for the purposes of

(*l*) See, for example, *Crampton* v. *Varna Rail. Co.* (1872), 7 Ch. App. 562.

(*m*) See *Baker* v. *Metropolitan Rail. Co.* (1862), 31 Beav. 504. As to time for exercising an option to purchase, see *Rangeley* v. *Midland Rail. Co.* (1868), 3 Ch. App. 306; *Kemp* v. *South Eastern Rail. Co.* (1872), 7 Ch. App. 364; and see *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480.

(*n*) *Wilson* v. *West Hartlepool Harbour and Rail. Co.* (1865), 34 L. J. (CH.) 241, C. A.; *Inge* v. *Birmingham, Wolverhampton, and Stour Valley Rail. Co.* (1853), 3 De G. M. & G. 658; *Regent's Canal Co.* v. *Ware* (1857), 23 Beav. 575; *Gunston* v. *East Gloucestershire Rail. Co.* (1868), 18 L. T. 8; *Ingram* v. *Midland Rail. Co.* (1860), 3 L. T. 533; *Tillett* v. *Charing Cross Bridge Co.* (1859), 28 L. J. (CH.) 863.

(*o*) *Catling* v. *Great Northern Rail. Co.* (1869), 18 W. R. 121, C. A.; *Rhys* v. *Dare Valley Rail. Co.* (1874), L. R. 19 Eq. 93; *Re Piggott and Great Western Rail. Co.* (1881), 18 Ch. D. 146; *Leggott* v. *Metropolitan Rail. Co.* (1870), 5 Ch. App. 716; *Fletcher* v. *Lancashire and Yorkshire Rail. Co.*, [1902] 1 Ch. 901; *Re Richard and Great Western Rail. Co.*, [1905] 1 K. B. 68, C. A.

(*p*) *Catling* v. *Great Northern Rail. Co.*, *supra*; *Doulton* v. *Metropolitan Board of Works* (1870), L. R. 5 Q. B. 333; *Wombwell* v. *Barnsley Corporation* (1877), 36 L. T. 708; *Bygrave* v. *Metropolitan Board of Works* (1886), 32 Ch. D. 147.

(*q*) As to the meaning of "extraordinary purposes," see p. 26, *ante*.

(*r*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 12.

(*s*) *Ibid.*, s. 13.

(*t*) *Ibid.*, s. 14.

SECT. 4. Purchase for Extra-ordinary Purposes.

the special Act, without the approbation of formerly the Treasury, now the Local Government Board, any lands which they could not have sold without such approbation (*a*) before the passing of the special Act, other than such lands as the promoters are by the powers of those Acts enabled to purchase or take compulsorily (*b*).

Part VI.—Procedure to acquire Land otherwise than by Agreement.

SECT. 1.—*Conditions as to Exercise of Powers.*

SUB-SECT. 1.—*Subscription of Capital.*

Capital must be subscribed.

67. When an undertaking is intended to be carried into effect by means of capital to be subscribed by the promoters, before the promoters can put into force any of the powers in relation to the compulsory taking of land conferred upon them by the special Act incorporating the Lands Clauses Acts, it is necessary that the whole of the capital or estimated sum for defraying the expenses of the undertaking be subscribed under contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed (*c*), and until this is done any exercise of compulsory powers by them will be *ultra vires* (*d*). This provision is for the benefit of the landowners; and if promoters serve a notice to treat upon an owner before the amount is subscribed, and he is willing to sell at a price to be fixed by a jury, the promoters cannot refuse to have the price ascertained on the ground that the service of the notice was *ultra vires* owing to the amount not having been subscribed (*e*). The restriction does not extend to cases where an existing company is authorised to construct additional works, and compulsory powers can be exercised by such a company before the new capital required for such works is subscribed (*f*).

(*a*) Municipal corporations before 1888 could only dispose of corporate land with the approval of the Treasury. See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 108, 109. But the Local Government Board was substituted for the Treasury by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72. See also Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56).

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 15. As to form of consent, see *Arnold* v. *Gravesend Corporation* (1856), 25 L. J. (CH.) 776. As to sale by wards of the City of London, see *Finnis and Young to Forbes and Pochin* (No. 1) (1883), 24 Ch. D. 587.

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 16.

(*d*) *R.* v. *Ambergate etc. Rail. Co.* (1853), 1 E. & B. 372.

(*e*) *Guest* v. *Poole and Bournemouth Rail. Co.* (1870), L. R. 5 C. P. 553. It was there said that the service of a notice to treat was not an exercise of the compulsory powers, but a neutral proceeding. And see to same effect *Re Uxbridge and Rickmansworth Rail. Co.* (1890), 43 Ch. D. 536, C. A. As to the taking possession of an easement under a special provision in a local Act not being a compulsory taking within this section, see *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787.

(*f*) *R.* v. *Great Western Rail. Co.* (1852), 1 E. & B. 253; *Weld* v. *South Western Rail. Co.* (1863), 33 L. J. (CH.) 142.

SECT. 1. Conditions as to Exercise of Powers.

A certificate under the hands of two justices certifying that the whole of the prescribed sum has been subscribed is sufficient, and in the absence of fraud, conclusive evidence (*g*) thereof; and on the application of the promoters and the production of such evidence as the justices think proper and sufficient such justices are required to grant a certificate accordingly (*h*).

When not under Lands Clauses Acts.

When the Lands Clauses Acts are not incorporated, promoters are not required before taking land compulsorily to show that they have or can obtain sufficient funds to pay for the land (*i*), but if an undertaking cannot be completed, and the promoters have deceived Parliament as to the sum necessary to complete it, an injunction may be granted until Parliament has conferred an extension of the powers (*k*).

SUB-SECT. 2.—*Limit of Time.*

Time limit for purchase.

68. The compulsory powers of purchasing and taking lands cannot be exercised after the expiration of the period prescribed for their exercise in the special Act, and if no period is prescribed but the Lands Clauses Acts are incorporated, then not after the expiration of three years from the passing of the special Act (*l*). In calculating such period the day on which the special Act was passed is excluded (*m*). If the Lands Clauses Acts are not incorporated, and no time is limited for the exercise of the powers of compulsory taking, they may be exercised so long as may be required for carrying out the purposes of the Act (*n*).

Under the Lands Clauses Acts the service of a notice to treat within the period is a sufficient exercise of the compulsory powers to comply with the restriction as to time (*o*); and if such a notice has been served, the promoters may after the expiration of the period enter upon the land before the purchase is completed, in manner provided by the Lands Clauses Acts (*p*); and the subsequent steps to complete the purchase may also be taken at any time before

(*g*) *Ystalyfera Iron Co.* v. *Neath and Brecon Rail. Co.* (1873), L. R. 17 Eq. 142.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 17.

(*i*) *Salmon* v. *Randall* (1838), 3 My. & Cr. 439.

(*k*) *Agar* v. *Regent's Canal Co.* (1814), 1 Swan. 250, n.; *King's Lynn Corporation* v. *Pemberton* (1818), 1 Swan. 244, at p. 250; *Blakemore* v. *Glamorganshire Canal Navigation* (1832), 1 My. & K. 154, at p. 164; *Lee* v. *Milner* (1837), 2 Y. & C. (EX.) 611, at p. 619; *Gray* v. *Liverpool and Bury Rail. Co.* (1846), 9 Beav. 391, at pp. 394, 400; *Cohen* v. *Wilkinson* (1849), 1 Mac. & G. 481.

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 123. Where, for example, periods are prescribed for the taking of land for specific purposes, but none for other purposes, the three years' limit will be applicable to these latter purposes (*Seymour* v. *London and South Western Rail. Co.* (1859), 5 Jur. (N. S.) 753). As to the meaning of the term "special Act" in this section where land is taken pursuant to a provisional order, see *Hill* v. *Haire*, [1899] 1 I. R. 87.

(*m*) *Goldsmiths' Co.* v. *West Metropolitan Rail. Co.*, [1904] 1 K. B. 1, C. A.

(*n*) *Salmon* v. *Randall*, *supra*.

(*o*) *Salisbury* (*Marquis*) v. *Great Northern Rail. Co.* (1852), 17 Q. B. 840; *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480, at p. 493.

(*p*) Cases in note(*o*), *supra*, and *Doe* d. *Armitstead* v. *North Staffordshire Rail. Co.* (1851), 16 Q. B. 526.

SECT. 1. Conditions as to Exercise of Powers.

the lapse of the period prescribed for the completion of the undertaking (*q*). The time for exercising compulsory powers may be extended by a subsequent statute, and notices previously given will not be invalidated thereby (*r*).

SECT. 2.—*The Notice to Treat.*

SUB-SECT. 1.—*Service of Notice.*

Notice to treat.

69. Where the promoters of an undertaking require to purchase or take any of the lands that they are by the special Act authorised to purchase or take (*s*), they are required under the Lands Clauses Acts to give notice thereof to all the parties interested in such lands, or to the parties by those Acts enabled to sell and convey or release the same, or to such of them as after diligent inquiry are known to the promoters (*a*). By this notice the promoters are required to demand from such parties the particulars of their estate and interest in such lands and of the claims made by them in respect thereof, and each notice must state the particulars as to position and quantity of the lands so required (*b*), and that the promoters are willing to treat for the purchase thereof and as to the compensation (*c*) to be made to all parties for the damage that may be sustained by them by reason of the execution of the works (*a*). Such notices are known as notices to treat.

Service of notice.

These notices must either be served personally on such parties or left at their usual place of abode, if any such after diligent inquiry can be found, and in case any of such parties shall be absent from the United Kingdom, or cannot be found after diligent inquiry, the notice must also be left with the occupier of the lands, or, if there is no such occupier, it must be affixed upon some conspicuous part of the lands (*d*). If the notice relates to land in the occupation of more than one tenant, the notice for the owner must be served on

(*q*) *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 493; *R.* v. *Birmingham and Oxford Junction Rail. Co.* (1850), 15 Q. B. 634, Ex. Ch.; *Sparrow* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1851), 9 Hare, 436; and compare *Brocklebank* v. *Whitehaven Junction Rail. Co.* (1847), 5 Ry. & Can. Cas. 373; *Wood* v. *North Staffordshire Rail. Co.* (1849), 3 De G. & Sm. 368. As to enforcing rights after the period fixed for the completion of the works, see *Richmond* v. *North London Rail. Co.* (1868), 3 Ch. App. 679; and as to completing works after that date under common law powers, see *Great Western Rail. Co.* v. *Midland Rail Co.*, [1908] 2 Ch. 455.

(*r*) *Ystalyfera Iron Co.* v. *Neath and Brecon Rail. Co.* (1873), L. R. 17 Eq. 142; *Bentley* v. *Rotherham and Kimberworth Local Board of Health* (1876), 4 Ch. D. 588; and see *Williams* v. *South Wales Rail. Co.* (1849), 3 De G. & Sm. 354; *River Dun Navigation Co.* v. *North Midland Rail. Co.* (1838), 1 Ry. & Can. Cas. 135.

(*s*) As to what lands are authorised to be required and taken for the purposes of the undertaking, see pp. 22 *et seq.*, *ante*.

(*a*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 18. For form of notice, see Encyclopædia of Forms, Vol. VIII., p. 40.

(*b*) *Kemp* v. *London, Brighton etc. Rail. Co.* (1839), 1 Ry. & Can. Cas. 495, at p. 506; *Sims* v. *Commercial Rail. Co.* (1838), 1 Ry. & Can. Cas. 431; *Dowling* v. *Pontypool, Caerleon, and Newport Rail. Co.* (1874), L. R. 18 Eq. 714, at p. 745; and see *Coats* v. *Caledonian Rail. Co.* (1904), 6 F. (Ct. of Sess.) 1042.

(*c*) As to compensation, see p. 33, *ante*.

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 19.

each occupier and must show that it is for the owner, but service on the occupiers will not be sufficient unless it can be shown that the owner was either absent from the United Kingdom or could not be found (*e*). Service on an agent is insufficient, and, in order that both parties may be bound, the service must be in accordance with the Acts (*f*).

Service on corporations.

When the party to be served is a corporation aggregate, the notice must be left at the principal office of business of such corporation, or if no such office can after diligent inquiry be found it must be served on some principal member, if any, of such corporation; and the notice must also be left with the occupier of the lands, or if there is no such occupier it must be affixed upon some conspicuous part of the lands (*g*).

When notice unnecessary.

70. No notice need be served if the promoters merely desire to interfere with or destroy incorporeal rights in property, such as easements, and do not desire to acquire such rights for purposes of the undertaking (*h*); and this is so even where they are authorised to purchase easements (*i*). But if, for the purpose of their undertaking, it would be sufficient for the promoters to purchase and take only easements (*k*) or corporeal rights in land, such as a stratum in order to construct a tunnel, they must serve notice to treat for the whole of the land (*l*), unless there is express power in their special Act to acquire an easement or some such limited right in the land, in which case they would under most statutes be required to serve notices in respect of such easements or other right (*m*). Under some Acts promoters are authorised to do certain work in or on land, such as to lay sewers or pipes (*n*) or to put up telegraph (*o*) or other posts in the subsoil of streets or in private land; but although in so doing they acquire a corporeal right in land, they need not under such Acts serve a notice to treat for the purchase of the right, but compensation for the injury done is recoverable subsequently (*p*).

(*e*) *Shepherd* v. *Norwich Corporation* (1885), 30 Ch. D. 553, at p. 570.

(*f*) *Ibid.*, at p. 573; *R.* v. *Great Northern Rail. Co.* (1876), 2 Q. B. D. 151, at pp. 154, 155.

(*g*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 20.

(*h*) *Macey* v. *Metropolitan Board of Works* (1864), 33 L. J. (CH.) 377; *Bedford (Duke)* v. *Dawson* (1875), L. R. 20 Eq. 353; and see *Clark* v. *London School Board* (1874), 9 Ch. App. 120; *Swainston* v. *Finn and the Metropolitan Board of Works* (1883), 52 L. J. (CH.) 235; *Badham* v. *Marris* (1882), 52 L. J. (CH.) 237; *Bush* v. *Trowbridge Waterworks Co.* (1875), L. R. 19 Eq. 291, 10 Ch. App. 459; *London School Board* v. *Smith*, [1895] W. N. 37.

(*i*) *Wigram* v. *Fryer* (1887), 36 Ch. D. 87.

(*k*) *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 5 De G. M. & G. 851, at p. 862.

(*l*) *Ramsden* v. *Manchester South Junction and Altrincham Rail. Co.* (1848), 1 Exch. 723; *Sparrow* v. *Oxford etc. Rail. Co.* (1852), 2 De G. M. & G. 94, at p. 108; *Falkner* v. *Somerset and Dorset Rail. Co.* (1873), L. R. 16 Eq. 458; *Re Metropolitan District Rail. Co. and Cosh* (1880), 13 Ch. D. 607, at p. 616.

(*m*) *Hill* v. *Midland Rail. Co.* (1882), 21 Ch. D. 143; *Farmer* v. *Waterloo and City Rail. Co.*, [1895] 1 Ch. 527; and compare *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787.

(*n*) *E.g.*, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 54.

(*o*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 6.

(*p*) As to sewers and pipes, see *Thornton* v. *Nutter* (1867), 31 J. P. 419;

SECT. 2. The Notice to Treat.

Parties to be served.

71. The parties to be served with the notice include all parties necessary to convey all interests in the land, whether legal or equitable (*q*), as, for example, mortgagees (*r*). If the promoters acquire land subject to short tenancies, these may be determined by notice to quit in the ordinary way, and need not be separately purchased (*s*), or the lessor may agree with the promoters to give notices to quit and sell the land freed from these tenancies (*t*). Promoters cannot, however, exercise a power of resuming possession, which may have been reserved by the lessor in the lease, in order to avoid payment of compensation (*a*), nor can a lessor exercise such a power in order to sell to promoters unless such exercise is expressly sanctioned by the terms of the lease (*b*).

SUB-SECT. 2.—*Effect of Service.*

Effect of service of notice.

72. The effect of serving a notice to treat is to establish a relation analogous in some respects to that of purchaser and vendor, a relation which binds the promoters to take the land and binds the landowner to give up the land subject to his being paid compensation (*c*). Until the price is ascertained the land remains the property of the landowner, but both parties have the right to have the price ascertained and the purchase completed in manner provided by the Lands Clauses Acts (*d*). The rights and obligations so created are legal as distinct from equitable, and they bind all persons claiming under the owner, whether with notice of the service or not (*e*).

Roderick v. *Aston Local Board* (1877), 5 Ch. D. 328, C. A.; *North London Rail. Co.* v. *Metropolitan Board of Works* (1859), 28 L. J. (CH.) 909; *Hughes* v. *Metropolitan Board of Works* (1861), 4 L. T. 318. As to posts, see *Escott* v. *Newport Corporation*, [1904] 2 K. B. 369. On this point see further, Part IX., p. 104, *post*.

(*q*) *Rogers* v. *Kingston-upon-Hall Dock Co.* (1864), 11 L. T. 463; *Re King's Leasehold Estates, Ex parte East of London Rail. Co.* (1873), L. R. 16 Eq. 521; *Sweetman* v. *Metropolitan Rail. Co.* (1864), 1 Hem. & M. 543; *Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1888), 40 Ch. D. 268. As to what are interests in land, see p. 33, *ante*.

(*r*) *Martin* v. *London, Chatham, and Dover Rail. Co.* (1866), 1 Ch. App. 501, at p. 505; and compare *Hill* v. *Great Northern Rail. Co.* (1854), 5 De G. M. & G. 66.

(*s*) *Syers* v. *Metropolitan Board of Works* (1877), 36 L. T. 277, at p. 278, C. A. Special provision is made for the compensation of tenants having no greater interest than as tenants for a year or from year to year, and who are required to leave before the end of their tenancy. See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121; and p. 148, *post*.

(*t*) *Ex parte Nadin* (1848), 17 L. J. (CH.) 421.

(*a*) *Fleming* v. *Newport Rail. Co.* (1883), 8 App. Cas. 265, approving *Solway Junction Rail. Co.* v. *Jackson* (1874), 1 R. (Ct. of Sess.) 831; and see p. 33, *ante*.

(*b*) *Johnson* v. *Edgware, Highgate and London Rail. Co.* (1866), 35 Beav. 480; *Re Morgan and London and North Western Rail. Co.*, [1896] 2 Q. B. 469.

(*c*) *Haynes* v. *Haynes* (1861), 1 Drew. & Sm. 426, at p. 450; *Adams* v. *London and Blackwall Rail. Co.* (1850), 2 Mac. & G. 118; *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480, at pp. 493, 511; *Mercer* v. *Liverpool, St. Helens, and South Lancashire Rail. Co.*, [1903] 1 K. B. 652, C. A., at p. 661, approved in [1904] A. C. 461, at pp. 463, 465; and see *Clippen's Oil Co.* v. *Edinburgh Water Trustees*, [1902] W. N. 157, H. L.

(*d*) *Fotherby* v. *Metropolitan Rail. Co.* (1866), L. R. 2 C. P. 188; *Tiverton and North Devon Rail. Co.* v. *Loosemore*, *supra*, at p. 493; and see *R.* v. *Hungerford Market Co.* (1832), 4 B. & Ad. 327.

(*e*) *Mercer* v. *Liverpool, St. Helens, and South Lancashire Rail. Co.*, *supra*, *per* STIRLING, L.J., at p. 662, approved [1904] A. C. 461, at pp. 463, 465.

A landowner who has received a notice to treat in respect of his land cannot deal with such land, or with land held therewith, so as to increase the burdens of the promoters as regards the compensation to be made in respect of such land or any of it (*f*), but subject thereto he may sell or convey it or otherwise deal with it (*g*), and the right to be paid compensation under the notice to treat may be assigned and dealt with as property (*h*), but the sum which may become due is not a debt which can be attached by garnishee order until the conveyance has been in fact executed (*i*). The service of a notice to treat is not equivalent to a notice requiring possession of the property, and does not confer equivalent rights (*k*). It confers the right to have the compensation ascertained in the manner provided in the Lands Clauses Acts in respect of all the land mentioned in it, and all the subsequent proceedings must have relation to the whole of the land to which the notice to treat refers (*l*). Neither party can without the consent of the other have the value of part only of the land assessed (*m*). Each person on whom a notice to treat has been served is entitled to have the compensation as regards his own particular interest assessed separately (*n*).

Subsequent notices.

73. Promoters may, however, serve the same person with more than one notice in respect of different lands. Thus, if the land specified in one notice is not sufficient for the purposes of their undertaking, they may serve another for the purchase of additional land (*o*), or, having purchased the surface, they may serve a further notice in respect of the minerals (*p*). If a notice to treat has been validly withdrawn, promoters may serve another in respect of the

(*f*) *Mercer* v. *Liverpool, St. Helens, and South Lancashire Rail. Co.*, [1904] A. C. 461, H. L., *per* LINDLEY, L.J., at p. 465; and see *Johnson* v. *Edgware, Highgate and London Rail. Co.* (1866), 14 L. T. 45, and pp. 33, *et seq.*, *ante*.

(*g*) *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 260, at pp. 268, 269, C. A.; *Sewell* v. *Harrow and Uxbridge Rail. Co.* (1902), 19 T. L. R. 130; *Carnochan* v. *Norwich and Spalding Rail. Co.* (1858), 26 Beav. 169; and compare *Metropolitan Rail. Co.* v. *Woodhouse* (1865), 13 W. R. 516; *South Western Rail. Co.* v. *Coward* (1848), 5 Ry. & Can. Cas. 703. If the notice relates to part only of a parcel of land, a building agreement in regard thereto, if severable, will apply to the remainder (*Furness* v. *Willesden Urban District Council* (1905), 70 J. P. 25). And see also cases cited in note (*a*) on p. 33, *ante*.

(*h*) *Dawson* v. *Great Northern and City Rail. Co.*, *supra*, at p. 271.

(*i*) *Richardson* v. *Elmit* (1876), 2 C. P. D. 9; *Howell* v. *Metropolitan District Rail. Co.* (1881), 19 Ch. D. 508.

(*k*) *E.g.*, it does not entitle a yearly tenant to obtain compensation in manner provided by s. 121 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18) (*R.* v. *Stone* (1866), L. R. 1 Q. B. 529; *Great Northern and City Rail. Co.* v. *Tillett*, [1902] 1 K. B. 874).

(*l*) *Stone* v. *Commercial Rail. Co.* (1839), 4 My. & Cr. 122; *Ecclesiastical Commissioners* v. *London Commissioners of Sewers* (1880), 14 Ch. D. 305; *Ex parte Bailey* (1852), Bail. Ct. Cas. 66.

(*m*) *Thompson* v. *Tottenham and Forest Gate Rail. Co.* (1892), 67 L. T. 416.

(*n*) *Fotherby* v. *Metropolitan Rail. Co.* (1866), L. R. 2 C. P. 188; *Abrahams* v. *London Corporation* (1868), L. R. 6 Eq. 625.

(*o*) *Simpson* v. *Lancaster and Carlisle Rail. Co.* (1847), 15 Sim. 580; *Stamps* v. *Birmingham, Wolverhampton, and Stour Valley Rail. Co.* (1848), 7 Hare, 251; and see *Williams* v. *South Wales Rail. Co.* (1849), 3 De G. & Sm. 354.

(*p*) *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559, C. A.

SECT. 2. The Notice to Treat.

same or part of the same property, so long as the time for compulsory purchase remains unexpired (*q*).

Withdrawal of notice and waiver.

74. Neither party can get rid of the obligation imposed by a notice to treat without the consent of the other party (*r*), unless the party served is entitled to serve a counter-notice requiring the promoters to take more land than they desire, in which case the promoters may withdraw (*s*), or unless there are provisions in the special Act authorising the promoters to withdraw notices to treat (*t*). But if either party by laches or misconduct delays the fulfilment of the *quasi*-contract to purchase, such party may thereby deprive himself of the right to enforce the notice to treat (*u*). The conduct of the parties may, in like manner, amount to a waiver of their rights under the notice, as, for example, if after some delay the promoters inform the landowner of their intention to abandon the undertaking (*v*). Similarly, the implied acceptance of an invalid notice by acts done under it may prevent the parties from contesting its validity (*a*).

SUB-SECT. 3.—*Notice of Claim.*

When notice of claim necessary.

75. Although the notice to treat must demand from the parties served particulars of their estate and interest in the lands referred to in the notice, and of the claims made by them in respect thereof, there is no provision in the Lands Clauses Acts making it obligatory on an owner to supply these particulars (*b*), except where he desires to have the amount settled by arbitration and the claim or offer exceeds £50 (*c*). In that event he must signify such desire by notice in writing to the promoters (*d*) at any time before they have issued their warrant to the sheriff to summon a jury in respect of such

(*q*) *Ashton Vale Iron Co.* v. *Bristol Corporation*, [1901] 1 Ch. 591, C. A.

(*r*) *Haynes* v. *Haynes* (1861), 1 Drew. & Sm. 426, at p. 456; *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480.

(*s*) *E.g.*, to take a whole house, when part only is required, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92, as to which see p. 73, *post*, and *Tawney* v. *Lynn and Ely Rail. Co.* (1847), 16 L. J. (CH.) 282.

(*t*) *E.g.*, Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 39 (8); and see also *R.* v. *Commissioners of Woods and Forests* (1850), 15 Q. B. 761.

(*u*) A railway company might do so by delaying to complete until the time for executing the authorised works had expired (*Tiverton and North Devon Rail. Co.* v. *Loosemore, supra*, at p. 496; *Richmond* v. *North London Rail. Co.* (1868), L. R. 5 Eq. 352, (1868) 3 Ch. App. 679, *per* Lord CAIRNS, L. C., at p. 680; and see p. 63, *ante*).

(*v*) *Hedges* v. *Metropolitan Rail. Co.* (1860), 28 Beav. 109; *Stretton* v. *Great Western and Brentford Rail. Co.* (1870), 5 Ch. App. 751.

(*a*) *Lynch* v. *London Commissioners of Sewers* (1886), 32 Ch. D. 72, C. A.; *R.* v. *South Holland Drainage Committee* (1838), 8 Ad. & El. 429; *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 24 L. J. (CH.) 417, C. A.

(*b*) It is the common practice to supply these particulars whether arbitration is desired or not, and a form of claim to be filled up by the person served is almost invariably attached to the notice to treat. See Encyclopædia of Forms, Vol. VIII., p. 43. In some recent special Acts a clause has been inserted providing that the claimant may be deprived of his costs in the event of his not supplying particulars sufficient to enable the promoters to make a proper offer.

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 23.

(*d*) As to service of notice on promoters, see *ibid.*, s. 134. For form of notice of claim, see Encyclopædia of Forms, Vol. VIII., p. 43.

lands, and he must state in such notice the nature of the interest in respect of which he claims compensation, and the amount so claimed (*e*). The particulars must be such as to enable the promoters to appreciate the true nature and extent of the claimant's interest both as to quantity and quality of estate, and to ascertain its value (*f*). Particulars will be enough, however, if they are sufficient to enable the promoters to determine the fairness and propriety of the claim (*g*). If the promoters accept the particulars as sufficient and proceed to arbitration, they cannot afterwards object on the ground of insufficiency (*h*). The amount claimed is also required to be stated in order that the promoters may consider whether they will pay the sum or offer a smaller amount (*i*).

SECT. 3.—*Rights as to the Assessment of Compensation.*

Methods for assessing compensation.

76. On the service of the notice to treat on a person having an interest in land the promoters and the person served are each entitled to have the amount of the purchase price and compensation agreed to or assessed within a reasonable time (*k*). Under the Lands Clauses Acts the promoters may cause a jury to be summoned to ascertain the amount if for twenty-one days after the service of the notice the party served fails to state the particulars of his claim in respect of the land referred to therein or to treat with them in respect thereof, or if they and such party do not agree as to the amount of the purchase-money and compensation to be paid (*l*).

By justices

If the person served makes a claim which does not exceed £50, and the parties fail to agree, the purchase price and compensation must be settled by two justices (*m*), and either party may take the necessary steps to have this done (*n*).

If the compensation claimed or offered exceeds £50, the party

(*e*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 23.

(*f*) Thus, to describe an interest as leasehold without stating the extent of the term would be insufficient (*Healey* v. *Thames Valley Rail. Co.* (1864), 5 B. & S. 769, 778).

(*g*) *Cameron* v. *Charing Cross Rail. Co.* (1864), 16 C. B. (N. S.) 430; and see *Healey* v. *Thames Valley Rail. Co.* (1864), 5 B. & S., 769, at p. 781.

(*h*) *Lovering* v. *City of London and Southwark Subway Co.* (1891), 7 T. L. R. 600, C. A.; *Re North Staffordshire Rail. Co. and Landor* (1848), 2 Exch. 235, at p. 242; and compare *Re King's Leasehold Estates, Ex parte East of London Rail. Co.* (1873), L. R. 16 Eq. 521.

(*i*) *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.* (1872), L. R. 7 Q. B. 776, at p. 781.

(*k*) *Fotherby* v. *Metropolitan Rail. Co.* (1866), L. R. 2 C. P. 188; *Morgan* v. *Metropolitan Rail. Co.* (1868), L. R. 4 C. P. 97, Ex. Ch.; and see *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480, *per* Lord BLACKBURN, at p. 493.

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 21, 23, 39. In some recent Acts, such as the Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 20, the promoters can require the amount to be settled by arbitration, and in others, such as the Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 13, the amount of the compensation can only be settled by arbitration, while under some old Acts, as, for example, under the Metropolitan Paving Act, 1817 (Michael Angelo Taylor's Act, 57 Geo. 3, c. xxix.), s. 82, it can only be settled by a jury.

(*m*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 22.

(*n*) *Ibid.*, s. 24.

SECT. 3. Rights as to the Assessment of Compensation.

claiming may, if he so desires, have the amount settled by arbitration.

By a jury.

77. If, when the matter has been referred to arbitration, the arbitrators or their umpire fail for three months to make their or his award, or if no final award is made, the question of the amount of the compensation must be settled by the verdict of a jury (*o*), unless the parties agree to extend the time (*p*). The period of three months may also be extended by order of a court or a judge if the delay has not been unreasonable (*q*), and this may be done after the period has expired in order that an award made after that time may be rendered valid (*r*), as otherwise it would be invalid (*s*).

If the owner does not so signify his desire to have the amount of the compensation settled by arbitration, or if the time for the award expires and is not extended, he will be entitled to require the promoters to issue their warrant to the sheriff to summon a jury within a reasonable time, and he may obtain a mandamus to compel them (*t*), if they on request to proceed neglect or refuse to do so (*u*). A mandamus may be obtained on motion for a prerogative writ in cases where speedy justice is necessary (*a*), and in other cases by action, even although the delay may have caused no damage. With the claim for a mandamus a claim for damages may or may not be joined (*b*). The fact that the capital of the company has not been subscribed is not a good answer by the company to such an action (*c*).

SECT. 4.—*Restrictions on taking Part of a House or Manufactory.*

SUB-SECT. 1.—*Right to have the whole Premises purchased.*

Taking portion of premises.

78. When the notice to treat relates to part only of any house or other building or manufactory, and the party served is able and

(*o*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 23.

(*p*) As to such agreement, see *Caledonian Rail. Co.* v. *Lockhart* (1860), 3 Macq. 808, H. L.; *Re Palmer and Metropolitan Rail. Co.* (1862), 10 W. R. 714; *R.* v. *Master Manley Smith* (1893), 63 L. J. (Q. B.) 171. As to such extension of time being inferred from conduct, see *Tyerman* v. *Smith* (1856), 6 E. & B. 719; *Bennett* v. *Watson* (1860), 29 L. J. (EX.) 357; *Darnley (Earl)* v. *London, Chatham, and Dover Rail. Co.* (1867), L. R. 2 H. L. 43; and see p. 81, *post.*

(*q*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 9; *Re Dare Valley Rail. Co.* (1869), 4 Ch. App. 554.

(*r*) *Lord* v. *Lee* (1868), L. R. 3 Q. B. 404; *Knowles & Sons, Ltd.* v. *Bolton Corporation*, [1900] 2 Q. B. 253, C. A.

(*s*) *Evans* v. *Lancashire and Yorkshire Rail. Co.* (1853), 1 E. & B. 754.

(*t*) *R.* v. *Birmingham and Oxford Junction Rail. Co.* (1850), 15 Q. B., 634, Ex. Ch.; *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480, at p. 493, and cases cited in notes (*a*) and (*b*), *infra.*

(*u*) *Re South Yorkshire, Doncaster, and Goole Rail. Co., Ex parte Senior* (1849), 18 L. J. (Q. B.) 333.

(*a*) *R.* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 512, discussing *R.* v. *Lambourn Valley Rail. Co.* (1888), 22 Q. B. D. 463; *London and North Western Rail. Co.* v. *Walker*, [1900] A. C. 109.

(*b*) *Fotherby* v. *Metropolitan Rail. Co.* (1866), L. R. 2 C. P. 188; *Morgan* v. *Metropolitan Rail. Co.* (1868), L. R. 4 C. P. 97, Ex. Ch.; *R.* v. *London Corporation* (1867), 16 L. T. 673. As to obtaining a mandamus by interlocutory order, see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8), and *Widnes Alkali Co.* v. *Sheffield and Midland Rail. Co.'s Committee* (1877), 37 L. T. 131.

(*c*) *Guest* v. *Poole and Bournemouth Rail. Co.* (1870), L. R. 5 C. P. 553.

SECT. 4. Restrictions on taking Part of a House or Manufactory.

willing to sell and convey the whole of his interest therein, whether such power of sale arises by virtue of the Lands Clauses Acts or otherwise (*d*), he may under those Acts require the promoters to purchase and take the whole, and he cannot be required at any time to sell and convey a part only (*e*). The insertion in the special Act, at the instance of the owner, of provisions for the protection of his property will not prevent him from exercising his right to require the whole to be taken (*f*). In the absence of provisions in the special Act, the promoters can similarly be prevented by the owner from taking the subsoil without the surface (*g*), but it is now a common provision in special Acts to authorise promoters expressly to take an easement in the subsoil, and also to take specified parts only of houses, buildings, or manufactories (*h*). Promoters in certain cases have also been allowed to take parts of buildings if the parts can, in the opinion of the assessing authority, be severed without material detriment to the remainder (*i*).

Rights of owner and promoters.

79. By a house is meant more than the mere fabric. The word includes the house, garden, and curtilage, in fact all that would pass on the conveyance of a house (*k*). It also means more

Meaning of house.

(*d*) *St. Thomas's Hospital* (*Governors*) v. *Charing Cross Rail. Co.* (1861), 30 L. J. (CH.) 395; *Grosvenor* v. *Hampstead Junction Rail. Co.* (1857), 26 L. J. (CH.) 731, C. A.; and see p. 58, *ante*.

(*e*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92. A lessee of a house may require the promoters to purchase his interest in the whole house independently of the rights of the lessor (*Pulling* v. *London, Chatham, etc. Rail. Co.* (1864), 33 L. J. (CH.) 505, C. A.). Similarly, if a person has a leasehold interest in a house and part of a garden, and a freehold interest in the remaining part, the promoters, if required to take the whole, cannot insist on taking either part (*Macgregor* v. *Metropolitan Rail. Co.* (1866), 14 L. T. 354; *Richards* v. *Swansea Improvement and Tramways Co.* (1878), 9 Ch. D. 425, C. A.; *Siegenberg* v. *Metropolitan District Rail. Co.* (1883), 49 L. T. 554). If a lessor sells part and a lessee the whole of his land, the promoters may remain liable on the covenants as to the parts not acquired from the lessor (*Piggott* v. *Middlesex County Council* (1908), 72 J. P. 461.

(*f*) As, for example, in order to construct a tunnel (*Sparrow* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1852), 2 De G. M. & G. 94, C. A.; *St. Thomas's Hospital* (*Governors*) v. *Charing Cross Rail. Co.* (1861), 30 L. J. (CH.) 395). If the whole is taken, the promoters would be released from the restrictive provisions (S. C. p. 401).

(*g*) *Sparrow* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1851), 9 Hare, 436; *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 5 De G. M. & G. 851, C. A.; *Furniss* v. *Midland Rail. Co.* (1868), L. R. 6 Eq. 473.

(*h*) *E.g.*, to take the subsoil only in order to construct underground railways (see clause in *Farmer* v. *Waterloo and City Rail. Co.*, [1895] 1 Ch. 527), or to take the forecourts of houses in order to widen streets.

(*i*) *E.g.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Sched. II. (12). As to such provision, see *Re Gonty and Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1896] 2 Q. B. 439, C. A.; *Caledonian Rail. Co.* v. *Turcan*, [1898] A. C. 256; *Allhusen* v. *Ealing and South Harrow Rail. Co.* (1898), 78 L. T. 285.

(*k*) *Grosvenor* v. *Hampstead Junction Rail. Co.* (1857), 26 L. J. (CH.) 731, C. A.; *Cole* v. *West London and Crystal Palace Rail. Co.* (1859), 28 L. J. (CH.) 767; *Marson* v. *London, Chatham and Dover Rail. Co.* (1868), L. R. 6 Eq. 101; *St. Thomas's Hospital* (*Governors*) v. *Charing Cross Rail. Co., supra*; *Richards* v. *Swansea Improvement and Tramways Co., supra*. Thus, it would include a shrubbery and the various orchards and gardens connected with a house (*Hewson* v. *London and South Western Rail. Co.* (1860), 8 W. R. 467; *King* v. *Wycombe Rail. Co.* (1860), 29 L. J. (CH.) 462; *Salter* v. *Metropolitan District Rail. Co.* (1870), L. R. 9 Eq. 432), and might include a paddock behind a house and accessible

SECT. 4. Restrictions on taking Part of a House or Manufactory.

than a dwelling-house or residence, and includes a shop, or an inn (*l*), or a building built for one purpose, such as a hospital (*m*). It also includes separate buildings in one ambit used for a common purpose (*n*). Conversely, one building used as two dwelling-houses, as in the case of semi-detached villas, is treated as two separate houses (*o*). Unfinished houses are also considered to be houses (*p*).

Meaning of manufactory.

80. In determining whether premises are a manufactory, regard must be had to the main use to which the premises are put (*q*). If the main business is manufacturing, the promoters may be required to take the whole of the premises, although part may be used for other purposes (*r*), or may be temporarily let to another occupier (*s*). If a manufactory is partly worked by water power, and promoters desire to take the water and the arrangements for storing and conveying the power, they may be required to take the whole manufactory (*t*). Where, however, the main business carried on upon premises is not manufacture, it is immaterial that some manufacture should be carried on incidentally thereto (*a*). In such a case the promoters may take the whole of the part used for manufacture without being required to take the other parts (*a*), and, similarly, they may take the part not used as the manufactory without taking the part so used (*b*).

only from the garden (*Barnes* v. *Southsea Rail. Co.* (1884), 27 Ch. D. 536; *Low* v. *Staines Reservoir Committee* (1900), 64 J. P. 212, C. A.), and also the courtyard to a house (*Caledonian Rail. Co.* v. *Turcan*, [1898] A. C. 256). It does not, however, include all land which the owner of the house may possess and enjoy along with the house, such as fields used for grazing (*Pulling* v. *London, Chatham, and Dover Rail. Co.* (1864), 33 L. J. (CH.) 505, C. A.; *Steele* v. *Midland Rail. Co.* (1866), 1 Ch. App. 275; *Fergusson* v. *London, Brighton, and South Coast Rail. Co.* (1863), 11 W. R. 1088, C. A.), or gardens and stables on the opposite side of the road and purchased subsequently to the purchase of the house (*Kerford* v. *Seacombe, Hoylake, and Deeside Rail. Co.* (1888), 57 L. J. (CH.) 270; and see *Chambers* v. *London, Chatham, and Dover Rail. Co.* (1863), 11 W. R. 479), or a private road leading to a mansion-house (*Allhusen* v. *Ealing and South Harrow Rail. Co.* (1898), 78 L. T. 285, 396, C. A.). Similarly, if a cottage stands in a nursery garden, the garden will not be deemed part of the house (*Falkner* v. *Somerset and Dorset Rail. Co.* (1873), L. R. 16 Eq. 458).

(*l*) *Richards* v. *Swansea Improvement and Tramways Co.* (1878), 9 Ch. D. 425, at p. 431, C. A.

(*m*) *St. Thomas's Hospital* (*Governors*) v. *Charing Cross Rail. Co.* (1861), 30 L. J. (CH.) 395.

(*n*) For examples, see *Richards* v. *Swansea Improvement and Tramways Co.* (1878), 9 Ch. D. 425, C. A.; *Siegenberg* v. *Metropolitan District Rail. Co.* (1883), 49 L. T. 554.

(*o*) *Harvie* v. *South Devon Rail. Co.* (1874), 32 L. T. 1, C. A.

(*p*) *Alexander* v. *Crystal Palace Rail. Co.* (1862), 30 Beav. 556.

(*q*) *Richards* v. *Swansea Improvement and Tramways Co.*, *supra*, at pp. 434—436, C. A.

(*r*) As for a rubbish heap (*Sparrow* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1852), 2 De G. M. & G. 94, C. A.), or warehouses (*Spackman* v. *Great Western Rail. Co.* (1855), 1 Jur. (N. S.) 790).

(*s*) *Brook* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1895] 2 Ch. 571.

(*t*) *Furniss* v. *Midland Rail. Co.* (1868), L. R. 6 Eq. 473.

(*a*) *Bennington & Sons* v. *Metropolitan Board of Works* (1886), 54 L. T. 837, where blending and packing tea was the principal business, and the making of packing cases an incidental part.

(*b*) *Reddin* v. *Metropolitan Board of Works* (1862), 4 De G. F. & J. 532.

SECT. 4. Restrictions on taking Part of a House or Manufactory.

81. The date of the service of the notice to treat fixes the time when the premises are to be considered in order to determine whether the land proposed to be purchased or taken is part of a house, building, or manufactory (*c*). Changes made after that date are immaterial (*d*). Changes of use or occupation, if made *bonâ fide*, may be made at any time before the service of the notice (*e*).

SUB-SECT. 2.— *Notice requiring whole of Premises to be taken.*

Notice to take whole.

82. The party on whom the notice to treat is served may signify in any manner to the promoters that he requires them to take the whole of his house, building, or manufactory, provided he makes it clear what it is he requires them to take (*e*), and it is immaterial whether he calls it a manufactory when it is in fact a house (*f*). It is usual to serve a formal counter-notice, but this is not obligatory (*g*). An owner cannot, however, require promoters to take a different or larger part than that to which the notice relates (*h*).

Effect of notice.

83. The effect of giving promoters notice that they are required to take the whole of a house, building, or manufactory, when given in a proper case, is to enable the promoters to purchase the whole or to withdraw the notice to treat as to the part (*i*), and if they withdraw the notice to treat, the subsequent withdrawal of the counter-notice will not revive the original notice to treat (*k*). The parties are relegated to the same position as they were in before the notice to treat was served, and the promoters can serve a fresh notice as to the same premises or as to a different part of them, if they so desire (*l*). If, however, the owner withdraws his counter-notice before the promoters have signified their desire either to take the whole or to withdraw the notice to treat, the original notice to treat will be revived (*m*), but no formal notice to take, or of their intention to take, the whole is required to be given by the promoters, provided they signify their intention in such a way as to bind

(*c*) *Richards* v. *Swansea Improvement and Tramways Co.* (1878), 9 Ch. D. 425, C. A.

(*d*) *Chambers* v. *London, Chatham, and Dover Rail. Co.* (1863), 11 W. R. 479; *Treadwell* v. *London and South Western Rail. Co.* (1884), 54 L. J. (CH.) 565. Thus, a landowner cannot by building a house on a parcel of land in respect to part of which he has received a notice to treat, thereby compel the promoters to take the whole (*Littler* v. *Rhyl Improvement Commissioners*, [1878] W. N. 219).

(*e*) *Gardner* v. *Charing Cross Rail. Co.* (1861), 2 John. & H. 248; *Spackman* v. *Great Western Rail. Co.* (1855), 1 Jur. (N. S.) 790; *Pollard* v. *Middlesex County Council* (1906), 95 L. T. 870.

(*f*) *Richards* v. *Swansea Improvement and Tramways Co.*, *supra*, at p. 433, C. A.

(*g*) A verbal notice, followed by a suit to restrain the promoters from proceeding to take or enter upon part, would be sufficient (*Binney* v. *Hammersmith and City Rail. Co.* (1863), 8 L. T. 161).

(*h*) *Pulling* v. *London, Chatham, and Dover Rail. Co.* (1864), 33 L. J. (CH.) 505, C. A.; *Thompson* v. *Tottenham and Forest Gate Rail. Co.* (1892), 67 L. T. 416.

(*i*) *King* v. *Wycombe Rail. Co.* (1860), 28 Beav. 104; *R.* v. *London and South Western Rail. Co.* (1848), 12 Q. B. 775; *R.* v. *London and Greenwich Rail. Co.* (1842), 3 Q. B. 166.

(*k*) *Ex parte Quick* (1865), 12 L. T. 580.

(*l*) *Ashton Vale Iron Co., Ltd.* v. *Bristol Corporation*, [1901] 1 Ch. 591, C. A.

(*m*) *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 1 K. & J. 34.

SECT. 4. Restrictions on taking Part of a House or Manufactory.

themselves (*n*). Equivocal acts relating to the appointment of an arbitrator will not prevent them from withdrawing their notice to treat (*o*). When the counter-notice is given in a case where it is not valid, the promoters may disregard it and proceed with the notice to treat (*p*), and they will not be bound by such counter-notice, even although it may have been accepted by their solicitors (*q*). A valid counter-notice given upon service of an invalid notice to treat, and acted upon, may estop the parties from setting up the invalidity (*r*).

When an owner has served a valid counter-notice he may obtain an injunction to restrain the promoters from taking part only (*s*), or a declaration that they cannot purchase or take part (*t*), or, if they have entered, a declaration that they should take the whole (*a*). The deposit to be made on entry before the purchase is completed should, in such a case, be the value of the whole premises (*b*).

Time for notice.

84. The owner may signify his desire that the promoters should take the whole of the premises at any time, provided he has not by his conduct estopped himself from so doing (*c*), as, for example, by agreeing to the price to be paid for the part. The sending in of a claim for a part, and uncompleted negotiations as to the compensation to be paid for the part, will not estop him from claiming the whole (*d*).

SECT. 5.—*Requirements as to taking Small Portions of Intersected Lands.*

Intersected lands.

85. If any lands, not being situate in a town or built upon (*e*), are so cut through and divided by the authorised works as to

(*n*) *Schwinge* v. *London and Blackwall Rail. Co.* (1855), 24 L. J. (CH.) 405.

(*o*) *Grierson* v. *Cheshire Lines Committee* (1874), L. R. 19 Eq. 83; *Ashton Vale Iron Co.* v. *Bristol Corporation*, [1901] 1 Ch. 591, at p. 601, C. A.

(*p*) *Harvie* v. *South Devon Rail. Co.* (1874), 32 L. T. 1, C. A.; *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1882), 22 Ch. D. 25, at pp. 35, 50, C. A. (1884), 9 App. Cas. 480, H. L.

(*q*) *Treadwell* v. *London and South Western Rail. Co.* (1884), 51 L. T. 894.

(*r*) *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 24 L. J. (CH.) 417, C. A.

(*s*) *Barnes* v. *Southsea Rail. Co.* (1884), 27 Ch. D. 536; *Lavers* v. *London County Council* (1905), 93 L. T. 233; *Marson* v. *London, Chatham, and Dover Rail. Co.* (1869), L. R. 7 Eq. 546.

(*t*) *Richards* v. *Swansea Improvement and Tramways Co.* (1878), 9 Ch. D. 425, C. A.

(*a*) *King* v. *Wycombe Rail. Co.* (1860), 29 L. J. (CH.) 462; *Sparrow* v. *Oxford, Worcester, and Wolverhampton Rail. Co.* (1852), 2 De G. M. & G. 94, C. A.

(*b*) *Giles* v. *London, Chatham and Dover Rail. Co.* (1861), 30 L. J. (CH.) 603; *Underwood* v. *Bedford and Cambridge Rail. Co.* (1861), 7 Jur. (N. S.) 941; *Gardner* v. *Charing Cross Rail. Co.* (1861), 2 John. & H. 248. As to entry, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85, and Part VIII., p. 97, *post*. For form of conveyance, see Encyclopædia of Forms, Vol. VIII., p. 103.

(*c*) *Barker* v. *North Staffordshire Rail. Co.* (1848), 2 De G. & Sm. 55; *Gardner* v. *Charing Cross Rail. Co.* (1861), 2 John. & H. 248.

(*d*) *Lavers* v. *London County Council* (1905), 93 L. T. 233; *Pollard* v. *Middlesex County Council* (1906), 95 L. T. 870.

(*e*) A market-garden with a cottage on it is not land built upon (*Falkner* v. *Somerset and Dorset Rail. Co.* (1873), L. R. 16 Eq. 458).

SECT. 5.
Requirements as to taking Small Portions of Intersected Lands.

leave either on both sides or on one side thereof a less quantity of land than half a statute acre, and if the owner of such small parcel of land requires the promoters to purchase the same (*f*) along with the other land required for the purposes of the special Act, the promoters must purchase the same accordingly, unless the owner thereof has other land adjoining that so left into which the same can be thrown, so as to be conveniently occupied therewith ; and if such owner has any other land so adjoining, the promoters of the undertaking, if so required by the owner, must at their own expense throw the piece of land so left into such adjoining land by removing the fences and levelling the sites thereof and by soiling the same in a sufficient and workmanlike manner (*g*).

Communication between parts.

86. If any small portion of land, whether in a town or not and whether built upon or not (*h*), is cut through and divided so as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making such a bridge, culvert, or such other communication between the land so divided as the promoters under the provisions of the special and incorporated Acts can be compelled to make (*i*), and if the owner of such lands has not other lands adjoining such piece of land, and if he requires the promoters to make such communication, then the promoters may require such owner to sell to them such piece of land; and any dispute as to the value of such piece of land or as to what would be the expense of making such communication must be settled in the manner provided in the Lands Clauses Acts for cases of disputed compensation (*k*). On the occasion of ascertaining the value of the land required to be taken for the purposes of the works, the jury or arbitrators, as the case may be, if required by either party, must ascertain by their verdict or award the value of any such severed piece of land, and also what would be the expense of making such communication (*l*). The provisions relating to the costs in other cases of disputed compensation do not apply to such an inquiry (*m*).

(*f*) As to including these lands in a reference as to the purchase price, see *Re North Staffordshire Rail. Co. and Wood* (1848), 2 Exch. 244.

(*g*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 93.

(*h*) *Eastern Counties and London and Blackwall Rail. Cos.* v. *Marriage* (1860), 9 H. L. Cas. 32.

(*i*) *E.g.*, Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68; and see *Falls* v. *Belfast and Ballymena Rail. Co.* (1849), 12 I. L. R. 233, Ex. Ch.

(*k*) See p. 69, *ante*, and p. 76, *post*.

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 94.

(*m*) *Cobb* v. *Mid Wales Rail. Co.* (1866), L. R. 1. Q. B. 342.

Part VII.—Assessment of the Purchase Price and Compensation.

SECT. 1. The Jurisdiction of Assessing Tribunals.

SECT. 1.—*The Jurisdiction of Assessing Tribunals.*

Amount only to be assessed.

87. The tribunals to assess the purchase price or compensation under the Lands Clauses Acts are required only to settle the amount thereof (*a*). Neither the title of the person claiming nor the liability of the promoters to pay is in question, and these may be contested in subsequent proceedings (*b*). It follows, therefore, that the verdict of a jury or the award of an arbitrator may be set aside if the assessment of the compensation is based on an erroneous finding that some right does or does not exist (*c*); and, as the rights of the parties are not determined, the verdict or award cannot be enforced as a judgment (*d*). For the same reason, proceedings to assess compensation will not be restrained by injunction on the ground that the claimant is not entitled to any compensation (*e*), and, likewise, the service of a notice to treat and the assessment of compensation will not estop the promoters from subsequently setting up a claim to the land as their own (*f*). Similarly, these tribunals cannot award anything in addition to the amount of price or compensation. Thus, they cannot apportion rent (*g*), or direct that accommodation works be carried out (*h*), or award an additional sum in respect of such works (*i*).

(*a*) As to juries, see *East and West India Docks and Birmingham Junction Rail. Co.* v. *Gatke* (1851), 3 Mac. & G. 155 ; *R.* v. *London and North Western Rail. Co.* (1854), 3 E. & B. 443 ; *Chapman* v. *Monmouthshire Rail. and Canal Co.* (1857), 2 H. & N. 267 ; *Read* v. *Victoria Station and Pimlico Rail. Co.* (1863), 32 L. J. (EX.) 167 ; *Brandon* v. *Brandon* (1864), 34 L. J. (CH.) 333 ; *Re North London Rail. Co., Ex parte Cooper* (1865), 34 L. J. (CH.) 373. As to arbitrators, see *Re Newbold and Metropolitan Rail. Co.* (1863), 14 C. B. (N. S.) 405 ; *Gould* v. *Staffordshire Potteries Waterworks Co.* (1850), 6 Ry. & Can. Cas. 568 ; *R.* v. *London and North Western Rail. Co.* (1854), 3 E. & B. 443 ; *Rhodes* v. *Airedale Drainage Commissioners* (1876), 1 C. P. D. 402, C. A. As to justices, see *R.* v. *Edwards* (1884), 13 Q. B. D. 586, C. A.

(*b*) *Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595, at pp. 598, 601.

(*c*) *R.* v. *London and North Western Rail. Co.* (1854), 3 E. & B. 443 ; *Horrocks* v. *Metropolitan Rail. Co.* (1863), 4 B. & S. 315. It is open, however, to the assessing tribunal to find that no damage has been done (*R.* v. *Lancaster and Preston Rail. Co.* (1845), 6 Q. B. 759).

(*d*) *Re East London Rail. Co., Oliver's Claim* (1890), 24 Q. B. D. 507 ; *Re Newbold and the Metropolitan Rail. Co.* (1863), 14 C. B. (N. S.) 405.

(*e*) *London and Blackwall Rail. Co.* v. *Cross* (1886), 31 Ch. D. 354, C. A. ; *North London Rail. Co.* v. *Great Northern Rail. Co.* (1883), 11 Q. B. D. 30, C. A. ; *Sutton Harbour Improvement Co.* v. *Hitchens* (1851), 1 De G. M. & G. 161, C. A. ; *Re Chilworth Gunpowder Co. and Manchester Ship Canal Co.* (1891), 8 T. L. R. 79.

(*f*) *Campbell* v. *Liverpool Corporation* (1870), L. R. 9 Eq. 579.

(*g*) *Re Ware and Regent's Canal Co.* (1854), 9 Exch. 395.

(*h*) S. C. ; and *R.* v. *South Holland Drainage Committee* (1838), 8 Ad. & El. 429.

(*i*) *R.* v. *South Wales Rail. Co.* (1849), 13 Q. B. 988 ; and compare *Re Byles and Ipswich Dock Commissioners* (1855), 25 L. J. (EX.) 53.

SECT. 2.—*Procedure before Justices.*

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Procedure before justices.

88. When any question of disputed compensation is authorised by the special Act and the Lands Clauses Acts incorporated therewith to be settled by two justices (*k*), either party may at any time (*l*) apply to any justice of the peace for the place in which the matter arises, and who is not interested in the subject-matter (*m*), to issue a summons calling upon the other party to appear before two such justices at a time and place to be named in the summons, and upon the appearance of such parties, or in the absence of any of them upon proof of due service of the summons, such justices may determine the amount of the disputed compensation (*n*). For that purpose they may examine such parties or any of them and their witnesses upon oath (*o*). The costs of every such inquiry are in the discretion of the justices, and they are required to settle the amount thereof (*n*). The determination is not an order within the meaning of the Summary Jurisdiction Act, 1848 (*p*), and cannot be enforced as such (*q*), and it need not be in writing, but may be delivered orally (*r*).

Finality of determination.

89. These proceedings may not be quashed or vacated for want of form, nor may they be removed by *certiorari* or otherwise into any of the superior courts in order to be quashed because of wrong admission of evidence or other irregularity, provided the justices have not exceeded their jurisdiction (*s*). If they have no jurisdiction, or if they have exceeded it, the proceedings may

(*k*) These are when the claim does not exceed £50 (see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 22, 68, 124, 125, and p. 69, *ante*, and p. 152, *post*), and when a person having no greater interest than as tenant for a year or from year to year is required to give up possession before the expiration of his term, see under *ibid.*, s. 121, and p. 149, *post*. Justices have also powers of settling the apportionment of rents under ss. 98, 116, and 119 of the same Act, and of determining differences as to accommodation works under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 69.

(*l*) The six months' limit in the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, does not apply to these applications (*R.* v. *Edwards* (1884), 13 Q. B. D. 586, C. A., approving *R.* v. *Hannay* (1874), 44 L. J. (M. C.) 27, and overruling *Re Edmundson* (1851), 17 Q. B. 67).

(*m*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 3, for definition of "justice."

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 24. "Full compensation" would ordinarily include costs properly incurred (*Huddersfield Corporation* v. *Shaw* (1890), 54 J. P. 724).

(*o*) As to "summoning" witnesses, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 143, which has been repealed so far as it relates to any matter to which the Summary Jurisdiction Acts apply, by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4. As to the principles upon which the justices must proceed in assessing the amount of compensation, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 63, 68, and Part III., *ante*.

(*p*) 11 & 12 Vict. c. 43.

(*q*) *R.* v. *Edwards* (1884), 13 Q. B. D. 586, at pp. 591, 594, C. A. Following the analogy of awards and assessments by jury, the determination of the justices would be enforceable by action in a court of competent jurisdiction. Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308, amounts not exceeding £20 may be ascertained by and recovered before a court of summary jurisdiction. For forms see Encyclopædia of Forms, Vol. VIII., pp. 72, 73.

(*r*) *R.* v. *Boyce Combe* (1863), 32 L. J. (M. C.) 67.

(*s*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 145; and see *R.* v. *Halifax Corporation* (1866), 14 L. T. 447; *Cowper-Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153, at p. 160.

SECT. 2. Procedure before Justices.

be removed by *certiorari* and quashed (*t*). Want of jurisdiction occurs when one of the justices is interested in the matter in dispute (*a*). When questions of law have arisen as to jurisdiction cases have been stated by justices for the opinion of the High Court (*b*).

SECT. 3.—*Procedure by Arbitration.*

SUB-SECT. 1.—*Appointment of Arbitrators.*

Single arbitrator.

90. When any question of disputed compensation arises which by the special Act and the Lands Clauses Acts is authorised or required to be settled by arbitration (*c*), the parties may concur in the appointment of a single arbitrator (*d*), but it is not necessary that an endeavour should be made to obtain such concurrence (*e*). If such single arbitrator should die or become incapable of acting before he shall have made his award, the matters referred to him are determined by arbitration under those Acts in the same manner as if such arbitrator had not been appointed (*f*). If the parties fail to concur in such appointment, each party on the request of the other party is required to nominate and appoint an arbitrator to whom such dispute shall be referred (*d*).

Appointment of arbitrator.

91. The appointment of an arbitrator is made by the promoters under their hands, or under the hands of any two of them or of their secretary or clerk, and by any other party under his hand, unless such party be a corporation aggregate, when it is made under the common seal of the corporation (*d*). It is not effective until notice thereof has been given to the other party (*g*). Such appointment must be delivered to the arbitrator, and is deemed a submission to arbitration on the part of the party making the same (*d*), and is a submission within the meaning of the Arbitration

(*t*) *R.* v. *Cheltenham Commissioners* (1841), 1 Q. B. 467.

(*a*) *R.* v. *Cheltenham Commissioners*, *supra*, and *R.* v. *Rand* (1866), L. R. 1 Q. B. 230. As to conferring jurisdiction by waiver when the interest of the justice is known, see *Wakefield Local Board of Health* v. *West Riding and Grimsby Rail. Co.* (1865), L. R. 1 Q. B. 84.

(*b*) *Bexley Heath Rail. Co.* v. *North*, [1894] 2 Q. B. 579, C. A.; *Great Northern and City Rail. Co.* v. *Tillett*, [1902] 1 K. B. 874. The right so to do has not been questioned, but since the case of *Boulter* v. *Kent JJ.*, [1897] A. C. 556, the application of the Summary Jurisdiction Acts to the assessment of compensation is not quite clear.

(*c*) Namely, where the claim exceeds £50, and the claimant desires arbitration rather than a jury. See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 23, 64, 68, 96, 99, 105, 110, 115, 124, 130. For form of notice by owner of desire for arbitration, see Encyclopædia of Forms, Vol. VIII., p. 48.

(*d*) *Ibid.*, s. 25. For forms of appointment of arbitrator, see Encyclopædia of Forms, Vol. VIII., pp. 49, 50, 51.

(*e*) *Eagle* v. *Charing Cross Rail. Co.* (1867), 36 L. J. (C. P.) 297. Compare *Yates* v. *Blackburn Corporation* (1860), 29 L. J. (EX.) 447. Agreements may be made to refer other matters besides the compensation or to proceed otherwise than as prescribed in the statute. *E.g.*, see *Collins* v. *South Staffordshire Rail. Co.* (1852), 21 L. J. (EX.) 247; *Martin* v. *Leicester Waterworks Co.* (1858), 3 H. & N. 463; *Caledonian Rail. Co.* v. *Lockhart* (1860), 3 Macq. 808, H. L., in which cases questions arose as to how far the statute was applicable.

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 29.

(*g*) *Tew* v. *Harris* (1847), 11 Q. B. 7; *Bradley* v. *London and North Western Rail. Co.* (1850), 5 Exch. 769. Notice of intention to appoint is not sufficient (S. C.). For form of notice, see Encyclopædia of Forms, Vol. VIII., p. 54.

Act, 1889 (*h*), which Act applies to arbitrations under the Lands Clauses Acts except in so far as it is inconsistent therewith (*i*), and the submission has the same effect as if it had been made an order of court (*k*). After the appointment has been made neither party has power to revoke it without the consent of the other (*l*), except by leave of the court or a judge (*m*), nor does the death of either party operate as a revocation (*l*).

Failure to appoint arbitrator.

92. Where one party has appointed an arbitrator on his own behalf and notified the other thereof, then if for the space of fourteen days after any dispute has arisen, and after a request in writing to appoint an arbitrator, which shall state the matter so required to be referred to arbitration, has been served on the other party, such last-mentioned party fails to appoint such arbitrator, then the party making the request may appoint the arbitrator he has appointed on his own behalf to act on behalf of both parties (*n*), and such arbitrator may proceed to hear and determine the matters in dispute, and his award will be final (*l*).

Arbitrator not acting.

93. If when two arbitrators have been appointed either of them at any stage of the proceedings refuses or for seven days neglects to act, the other arbitrator may proceed *ex parte*, and his decision will be as effectual as if he had been the single arbitrator appointed by both parties (*o*).

Should any arbitrator appointed by either party die or become incapable before the matters referred are determined, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fails to do so, the remaining or other arbitrator may proceed *ex parte;* and every arbitrator so substituted has the

(*h*) 52 & 53 Vict. c. 49; and see title ARBITRATION, Vol. I., p. 437.

(*i*) *Ibid.*, ss. 24, 25; and see *Re Dare Valley Rail. Co.* (1869), 4 Ch. App. 554; *Rhodes* v. *Airedale Drainage Commissioners* (1876), 1 C. P. D. 402, C. A.; *Ex parte Harper* (1874), L. R. 18 Eq. 539; *Re Harper and Great Eastern Rail. Co.* (1875), L. R. 20 Eq. 39; *Bidder* v. *North Staffordshire Rail. Co.* (1878), 4 Q. B. D. 412, C. A., cases under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), repealed and in effect re-enacted by the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

(*k*) Arbitration Act, 1889 (52 & 53 Vict c. 49), s. 1; Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 36.

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 25.

(*m*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 1. As to removal of an arbitrator for misconduct, see *ibid.*, s. 11. If one party object to the arbitrator appointed by the other on the ground of bias, he should apply at once to the court before taking further proceedings in the arbitration (*Elliott* v. *South Devon Rail. Co.* (1848), 2 De G. & Sm. 17).

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 25; *Bradley* v. *London and North Western Rail. Co.* (1850), 5 Exch. 773.) For form of appointment, see Encyclopædia of Forms, Vol. VIII., p. 52.

(*o*) *Ibid.*, s. 30; and as to the stage of the proceedings at which an arbitrator may refuse to act, see *Shepherd* v. *Norwich Corporation* (1885), 30 Ch. D. 553. Absence is not in itself a refusal (*Re Hawley and North Staffordshire Rail. Co.* (1848), 2 De G. & Sm. 33). As to the meaning of neglect, see *Willoughby* v. *Willoughby* (1847), 9 Q. B. 923. Compare Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 6; see title ARBITRATION, Vol. I., at p. 460.

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same powers and authorities as were vested in the former arbitrator at the time of his death or disability (*p*).

SUB-SECT. 2.—*Appointment of an Umpire.*

Umpire.

94. Where two arbitrators have been appointed, and no circumstances have occurred to entitle one of them to proceed *ex parte* (*q*), they are required before they enter upon the matters referred to them to nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ or which shall be referred to him under the provisions of the special Act and the Lands Clauses Acts (*r*).

The person chosen ought to be suitable and impartial (*s*). He ought not to be chosen by lot; but if two are chosen both of whom are proper, one of these may be chosen by lot (*t*). If such umpire dies or becomes incapable of acting, the arbitrators must forthwith appoint another in his place, and the decision of every such umpire on the matters so referred to him will be final (*a*). If in either of these cases the arbitrators refuse, or for seven days after request of either party to such arbitration neglect, to appoint an umpire, the Board of Trade on the application of either party to the arbitration is required to appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ or which shall be referred to him as aforesaid will be final (*b*).

The power to appoint an umpire given to the arbitrators, and to the Board of Trade on their default, is not affected by the incapacity of the arbitrators to make an award through lapse of time, and either the arbitrators or the Board of Trade may appoint an umpire, or in the case of his death appoint a new umpire, after twenty-one days from the appointment of the last arbitrator (*c*).

SUB-SECT. 3.—*Time for making the Award.*

Time for award.

95. Where two arbitrators are appointed, and neither refuses or neglects to act, they ought to make their award within twenty-one

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 26. For form of substituted appointment, see Encyclopædia of Forms, Vol. VIII., p. 53.

(*q*) *Shepherd* v. *Norwich Corporation* (1885), 30 Ch. D. 553.

(*r*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 27. As to when the matter is to be determined by the umpire, see *ibid.*, s. 31. For form of appointment, see Encyclopædia of Forms, Vol. VIII., p. 55.

(*s*) *Re Haigh and London and North Western and Great Western Rail. Cos.*, [1896] 1 Q. B. 649; *Elliott* v. *South Devon Rail. Co.* (1848), 2 De G. & Sm. 17. As to waiver of objection to umpire by parties, see *Re Clout and Metropolitan and District Rail. Cos.* (1882), 46 L. T. 141.

(*t*) *Re Hopper* (1867), L. R. 2 Q. B. 367.

(*a*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 27. If on the death of the umpire the parties agree to refer the matter to a single arbitrator, the provisions of the Lands Clauses Acts as to costs will still apply (*R.* v. *Master Manley Smith* (1893), 63 L. J. (Q. B.) 171).

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 28, as amended by Lands Clauses (Umpire) Act, 1883 (46 & 47 Vict. c. 15). For form of request to Board of Trade to appoint an umpire, see Encyclopædia of Forms, Vol. VIII., p. 55.

(*c*) *Re Bradshaw's Arbitration* (1848), 12 Q. B. 562, at p. 575; *Holdsworth* v. *Wilson* (1863), 32 L. J. (Q. B.) 289, Ex. Ch. (S. C. in court below reported as *Holdsworth* v. *Barsham* (1862), 31 L. J. (Q. B.) 145).

days after the day on which the last of such arbitrators shall have been appointed, but they may extend the time for any period up to three months by writing signed by both (*d*). The parties may also further extend the time by consent (*e*), and it may also be extended by a court or a judge when there has been no unreasonable delay (*f*), even after the time for making the award has expired (*g*).

Award by umpire.

If the arbitrators fail to make their award within the said twenty-one days or within the extended time, the matters referred to them are to be determined by the umpire (*h*). Even before the lapse of that time he may be called upon to decide on any matter on which the arbitrators may differ (*i*) by notice in writing from them to that effect (*k*). The umpire has three months within which to make his award (*l*), that period being measured from the date when the matter is referred to him or from the date when it devolves upon him under the Act (*m*).

SUB-SECT. 4.—*Declaration by Arbitrators and Umpire.*

Declaration to be made.

96. Before any arbitrator or umpire enters into the consideration of any matters referred to him (*n*) he is required to make and subscribe a declaration in the presence of a justice of the peace, but not necessarily a justice for the area in which the dispute arose (*o*), and this declaration must be annexed to the award when made (*p*). If any arbitrator or umpire, having made such declaration, wilfully acts contrary thereto, he is guilty of a misdemeanour (*p*). The failure

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 23, 31; *Re Bradshaw's Arbitration* (1848), 12 Q. B. 562, at p. 574; *Evans* v. *Lancashire and Yorkshire Rail. Co.* (1853), 1 E. & B. 754.

(*e*) *Caledonian Rail. Co.* v. *Lockhart* (1860), 3 Macq. 808, at p. 817, H. L.; *Re Palmer and Metropolitan Rail. Co.* (1862), 10 W. R. 714; and as to implied extension by the conduct of the parties, see *Tyerman* v. *Smith* (1856), 6 E. & B. 719; *Bennett* v. *Watson* (1860), 29 L. J. (EX.) 357; *Darnley (Earl)* v. *London, Chatham, and Dover Rail. Co.* (1867), L. R. 2 H. L. 43. For form of consent, see Encyclopædia of Forms, Vol. VIII., p. 56.

(*f*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 9; *Re Dare Valley Rail. Co.* (1869), 4 Ch. App. 554.

(*g*) *Lord* v. *Lee* (1868), L. R. 3 Q. B. 404; *Knowles* v. *Bolton Corporation*, [1900] 2 Q. B. 253; and see title ARBITRATION, Vol. I., p. 437.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 31.

(*i*) *Ibid.*, s. 27.

(*k*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Sched. I. (d).

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 23.

(*m*) *Skerratt* v. *North Staffordshire Rail. Co.* (1848), 17 L. J. (CH.) 161; *Re Bradshaw's Arbitration, supra; Holdsworth* v. *Wilson* (1863), 4 B. & S. 1. If he is appointed after the expiration of the period within which the arbitrators should have made their award, the three months is counted from the date of his appointment (*Re Pullen and Liverpool Corporation* (1882), 51 L. J. (Q. B.) 285).

(*n*) Delay in entering on the consideration and in making the declaration is immaterial if the declaration is made before the entering (*Re Bradshaw's Arbitration, supra*).

(*o*) *Davies* v. *South Staffordshire Rail. Co.* (1851), 21 L. J. (M. C.) 52.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 33. The declaration required is as follows:—

"I, A. B., do solemnly and sincerely declare that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the Act [naming the special Act].—A. B.

"Made and subscribed in the presence of ."

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to make or to annex the declaration will render the award invalid (*q*) unless the parties waive the informality (*r*).

SUB-SECT. 5.—*The Hearing.*

Powers of arbitrators.

97. The arbitrators and the umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and they may and, unless the parties otherwise agree, ought to examine the parties and their witnesses on oath (*s*), and they may administer the oaths necessary for that purpose (*t*).

They should give the parties an opportunity of being heard and of tendering evidence (*a*); and they may also consult, when necessary, men of science, valuers (*b*), and lawyers (*c*).

SUB-SECT. 6.—*Taking up the Award.*

Promoters must take up award.

98. The arbitrators and the umpire upon payment of their reasonable charges (*d*) are required to deliver their or his award to the promoters of the undertaking (*e*); and if the promoters refuse or neglect to take up the award, a mandamus may be obtained to compel them to do so (*f*). The claimant is not empowered to take up the award; and if he does so and pays the charges of the umpire, he cannot recover the amount from the promoters (*g*). The promoters are required to retain the award, but they must forthwith on demand at their own expense furnish a copy thereof to the other party to the arbitration, and at all times on demand produce the said award and allow it to be inspected or examined by such party or any person appointed by him for that purpose (*h*).

(*q*) *Ludlow Corporation* v. *Prosser* (1906), 70 J. P. 400.

(*r*) *Palmer* v. *Metropolitan Rail. Co.* (1862), 31 L. J. (Q. B.) 259; *Re Levick and Epsom and Leatherhead Rail. Co.* (1859), 1 L. T. 60.

(*s*) *Wakefield* v. *Llanelly Rail. and Dock Co.* (1864), 34 Beav. 245; compare, however, Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, and Sched. I. (f), (g).

(*t*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 32.

(*a*) *Re Hawley and North Staffordshire Rail. Co.* (1848), 2 De G. & Sm. 33, on appeal (1848), 5 Ry. & Can. Cas. 383; and see *Re Hewett and Portsmouth Waterworks Co.* (1862), 10 W. R. 780.

(*b*) *Caledonian Rail. Co.* v. *Lockhart* (1860), 3 Macq. 808, at p. 823, H. L.; *Anderson* v. *Wallace* (1835), 3 Cl. & Fin. 26, H. L.

(*c*) *Re Underwood and Bedford and Cambridge Rail. Co.* (1861), 11 C. B. (N. S.) 442.

(*d*) *R.* v. *South Devon Rail. Co.* (1850), 15 Q. B. 1043; *Llandrindod Wells Water Co.* v. *Hawksley* (1904), 68 J. P. 242. If the solicitors' costs of drawing up the award are by the award directed to be paid, these costs are liable to taxation (*Re Collyer, Bristow & Co.*, [1901] 2 K. B. 839, C. A.).

(*e*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 35. For form of award, see Encyclopædia of Forms, Vol. VIII., p. 57.

(*f*) *Re London and North Western Rail. Co. and Walker*, [1900] A. C. 109; *R.* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 512; *R.* v. *West Midland Rail. Co.* (1862), 10 W. R. 583; *Re Harper and Great Eastern Rail. Co.* (1875), L. R. 20 Eq. 39. A mandamus to take up the award will be granted on motion for a prerogative writ. See two first cited cases in this note, and p. 70, *ante*. As to the return to the writ, compare *R.* v. *West Midland Rail. Co.* (1863), 11 W. R. 357; *R.* v. *Cambrian Rail. Co.* (1869), L. R. 4 Q. B. 320.

(*g*) *Shrewsbury* (*Earl*) v. *Wirral Railways Committee*, [1895] 2 Ch. 812, C. A.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 35.

SUB-SECT. 7.—*Setting aside the Award.*

Setting aside irregular award.

99. No award made with respect to any question referred to arbitration under the special Act and the Lands Clauses Acts may be set aside for irregularity or error in matter of form (*i*). But an award may be set aside or referred back to an arbitrator upon the same procedure and on the same grounds as other awards may be set aside or referred back (*k*), such as on account of a mistake (*l*), or of misconduct which includes excess of jurisdiction, whether done by mistake or otherwise (*m*), and for uncertainty (*n*).

SUB-SECT. 8.—*Enforcing the Award.*

Enforcing award.

100. Awards are enforced by action for specific performance, which may be brought by either party (*o*), but promoters may also enforce the award by depositing the amount assessed in the bank and executing a deed poll (*p*). As a defence to such an action by the claimant the promoters may deny the claimant's title to the land or his right to compensation (*q*).

SUB-SECT. 9.—*Costs of the Arbitration.*

Costs.

101. All the costs of the arbitration in connection with the settlement of the compensation under the special Act and the

(*i*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 37. As to correcting clerical mistakes, see Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 7. A direction to pay the amount assessed which would be of no effect would be such an irregularity (*Re Harper and Great Eastern Rail. Co.* (1875), L. R. 20 Eq. 39; *Lindsay* v. *Direct London and Portsmouth Rail. Co.* (1850), 1 L. M. & P. 529; and see *Skerratt* v. *North Staffordshire Rail. Co.* (1848), 5 Ry. & Can. Cas. 178). Similarly, the finding of a lump sum in respect of separate claims for the value of the land and the damage from severance would not be ground for setting aside an award (*Re Bradshaw's Arbitration* (1848), 12 Q. B. 562; *Re Brogden and Llynvi Valley Rail. Co.* (1860), 9 C. B. (N. S.) 229; *Re Beaufort (Duke) and Swansea Harbour Trustees* (1860), 29 L. J. (C. P.) 241).

(*k*) See title ARBITRATION, Vol. I., at p. 476.

(*l*) *Re Dare Valley Rail. Co.* (1868), L. R. 6 Eq. 429.

(*m*) *Buccleuch (Duke)* v. *Metropolitan Board of Works* (1870), L. R. 5 Exch. 221, at p. 232, Ex. Ch., affirmed as to this (1872) L. R. 5 H. L. 418; and compare *Falkingham* v. *Victorian Railways Commissioners*, [1900] A. C. 452, P. C.

(*n*) *Barker* v. *North Staffordshire Rail. Co.* (1848), 12 Jur. 324; *Wakefield* v. *Llanelly Rail. and Dock Co.* (1864), 34 Beav. 245; *Re North Staffordshire Rail. Co. and Landor* (1848), 17 L. J. (EX.) 350; and *Re Same and Wood* (1848), 17 L. J. (EX.) 354.

(*o*) *Regent's Canal Co.* v. *Ware* (1857), 26 L. J. (CH.) 566; *Harding* v. *Metropolitan Rail. Co.* (1872), 7 Ch. App. 154; *Thompson* v. *Tottenham and Forest Gate Rail. Co.* (1892), 67 L. T. 416; and compare *Bridgend Gas and Water Co.* v. *Dunraven* (1885), 31 Ch: D. 219. An action for the amount of the compensation awarded for land taken will not lie until after the conveyance has been executed (*East London Union* v. *Metropolitan Rail. Co.* (1869), L. R. 4 Exch. 309; and see *Laird* v. *Pim* (1841), 7 M. & W. 474; *Howell* v. *Metropolitan District Rail. Co.* (1881), 19 Ch. D. 508; *Re Milford Docks Co.* (1883), 23 Ch. D. 292; *Lindsay* v. *Direct London and Portsmouth Rail. Co.* (1850), 1 L. M. & P. 529).

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 76, 77; see p. 107, *post*.

(*q*) *London and North Western Rail. Co.* v. *Walker*, [1900] A. C. 109; *Read* v. *Victoria Station and Pimlico Rail. Co.* (1863), 32 L. J. (EX.) 167; *Beckett* v. *Midland Rail. Co.* (1866), L. R. 1 C. P. 241; and see *London and North Western Rail. Co.* v. *Walker*, [1903] A. C. 289.

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Lands Clauses Acts (*r*), and all the costs incident thereto (*s*), are borne by the promoters of the undertaking unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters (*a*) either at or before the commencement of the arbitration, that is, before the arbitrators are appointed (*b*). If the same or a less sum is awarded than has been so offered, each party bears his own costs incident to the arbitration, and the costs of the arbitrators are borne by the parties in equal proportions (*a*).

Offer of compensation.

102. No offer is required to be made by the promoters (*c*); and if made, it may be withdrawn by them at any time up to the commencement of the arbitration, or afterwards by consent. If the offer made is withdrawn before the commencement of the arbitration, another offer may be made before then (*b*). The offer should be of a sum of money, and it must be made in respect of the same subject-matter as that upon which the award is made. It should not be an offer of a sum to include the costs as well as the compensation (*d*); and so, if the offer has been made in respect of various matters one of which is withdrawn from the arbitrator by agreement at the hearing, it will cease to be operative as an offer for the purpose of determining how the costs are to be borne (*e*). If the claim for compensation is divided into parts, but there is really only one matter in dispute, the total sums awarded and offered are to be regarded to determine the incidence of the costs (*f*). The arbitrators may not inquire as

(*r*) *Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425. In that case it was decided that variations of the Lands Clauses Acts by the special Act as to the arbitration procedure, but not specifically dealing with the costs, left the provision as to the costs in the Lands Clauses Acts unaffected and applicable to the arbitration. Costs of an arbitration held under the Lands Clauses Acts, but to which these Acts are not properly applicable, are not payable by the promoters (*Re London and North Western Rail. Co. and Walker*, [1903] A. C. 289), nor are costs of arbitrations under agreements as to compensation not carried out under the Lands Clauses Acts (*Doulton* v. *Metropolitan Board of Works* (1870), L. R. 5 Q. B. 333).

(*s*) This would include the costs of stating a special case for the opinion of the court during the arbitration (*Re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613, C. A.), but not of proceedings in connection with an award stated as a special case (*Re Gonty and Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1896] 2 Q. B. 439, C. A.). As to the costs of an abortive arbitration due to a misapprehension, see *Re Kilworth Rifle Range*, [1899] 2 I. R. 305. See generally title ARBITRATION, Vol. I., p. 470.

(*a*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 34; and compare s. 51 in case of assessment by a jury.

(*b*) *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.* (1872), L. R. 7 Q. B. 776; *Gray* v. *North Eastern Rail. Co.* (1876), 1 Q. B. D. 696; *Yates* v. *Blackburn Corporation* (1860), 29 L. J. (EX.) 447; *Lascelles* v. *Swansea School Board* (1899), 69 L. J. (Q. B.) 24.

(*c*) *Martin* v. *Leicester Waterworks Co.* (1858), 3 H. & N. 463.

(*d*) *Balls* v. *Metropolitan Board of Works* (1866), L. R. 1 Q. B. 337. Compare *Yates* v. *Blackburn Corporation*, *supra*.

(*e*) *Miles* v. *Great Western Rail. Co.*, [1896] 2 Q. B. 432, C. A.

(*f*) *Re Hayward and Metropolitan Rail. Co.* (1864), 4 B. & S. 787; and compare *R.* v. *Biram* (1852), 17 Q. B. 969. In cases of injurious affection only, where there are two distinct heads of claim, and the claimant succeeds in one, he is only entitled to costs of that one in regard to which he is successful (*Sharpe* v. *Metropolitan District Rail. Co.* (1879), 4 Q. B. D. 641, at pp. 652, 656, on appeal (1880), 5 App. Cas. 425; *Todd* v. *Metropolitan District Rail. Co.* (1871), 24 L. T. 435).

to the amount of the sum offered (*g*). If no offer is made, or if made it is withdrawn, all the costs are borne by the promoters (*h*).

SUB-SECT. 10.—*Taxation and Recovery of Costs.*

Taxation of costs.

103. The costs of and incidental to the arbitration and award, if either party so requires, are taxed and settled as between the parties by one of the masters of the Supreme Court (*i*). A mandamus will issue ordering a master to tax such costs if he wrongfully refuses jurisdiction (*j*), but the court has no power to review a master's taxation in cases where he does not so refuse, unless he exceeds his jurisdiction (*k*). In cases where he exceeds it the court may interfere by *certiorari* or mandamus (*l*). On such a taxation the master may tax as between the parties the charges of the umpire and arbitrators when not included in the award (*m*), but such taxation is not evidence against them as to the reasonableness of their charges (*n*). The costs may also be settled by the arbitrators (*o*), but this should not be done until after the award (*p*).

(*g*) *Gould* v. *Staffordshire Potteries Waterworks Co.* (1850), 6 Ry. & Can. Cas. 548, at p. 575.

(*h*) *Martin* v. *Leicester Waterworks Co.* (1858), 3 H. & N. 463; *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.* (1872), L. R. 7 Q. B. 776; *Foster* v. *Sheffield Corporation* (1895), 72 L. T. 549, C. A.; *R.* v. *Westminster* (*High Bailiff*), *Ex parte London County Council*, [1903] 2 K. B. 189.

(*i*) Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11), s. 1, repealing and in effect re-enacting s. 1 of the Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18). Any taxing master of the Supreme Court may tax these costs (*Covington* v. *Metropolitan District Rail. Co.*, [1903] 1 K. B. 231). The fees for such taxation are fixed in pursuance of the enactments relating to the fees to be taken in the offices of the masters, and all those enactments, including those relating to the taking of fees by means of stamps, apply to the fees in respect of such taxation (Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11), s. 1). As to costs of arbitration in respect of lands taken for small holdings or allotments, see p. 169, *post*, and Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), Sched. I. (6)).

(*j*) *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.*, *supra*; *Gray* v. *North Eastern Rail. Co.* (1876), 1 Q. B. D. 696; *Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 444.

(*k*) *Sandbach Charity Trustees* v. *North Staffordshire Rail. Co.* (1877), 3 Q. B. D. 1, C. A.; *Owen* v. *London and North Western Rail. Co.* (1867), L. R. 3 Q. B. 54; *Shrewsbury* (*Earl*) v. *Wirral Railways Committee*, [1895] 2 Ch. 812, C. A.; *Re Cannings and Middlesex County Council*, [1907] 1 K. B. 51, C. A. As to scale of costs usually allowed, see *Malvern Urban District Council* v. *Malvern Link Gas Co.* (1900), 83 L. T. 326, C. A.; *Debenham* v. *King's College, Cambridge* (1884), 1 Cab. & El. 428; Practice Notes on Taxation, No. 71; and Yearly Supreme Court Practice, 1909; and see note (*e*) on p. 93, *post*.

(*l*) *Owen* v. *London and North Western Rail. Co.*, *supra*; and see *Shrewsbury* (*Earl*) v. *Wirral Railways Committee*, *supra*, at pp. 817—819, C. A.

(*m*) *Re Prebble and Robinson*, [1892] 2 Q. B. 602; *Re Gilbert and Wright* (1904), 68 J. P. 143.

(*n*) *Llandrindod Wells Water Co.* v. *Hawkesley and Others* (1904), 68 J. P. 242, C. A.

(*o*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 34. This practice has fallen out of use since the power to have the costs taxed was introduced.

(*p*) *Gould* v. *Staffordshire Potteries Waterworks Co.* (1850), 5 Exch. 214, overruling *London and North Western Rail. Co.* v. *Quick* (1849), 5 Ry. & Can. Cas. 520.

SECT. 3. **Procedure by Arbitration.**

Remedies in respect of costs.

The costs may be recovered by action (*q*); and such action is maintainable although the costs may not have been settled by the arbitrators or ascertained by taxation, and the judge at the hearing may order such taxation (*r*). The right to costs is independent of the conveyance of the land, so that a *bonâ fide* claimant may recover them although he is unable to make a good title (*s*). The vendor of the land has no lien in respect of these costs, and they cannot be recovered in an action to enforce such lien (*t*).

SECT. 4.—*Procedure by Jury.*

SUB-SECT. 1.—*Choice of Tribunal.*

Choice of tribunal.

104. Questions of disputed compensation which under the special Act or the Lands Clauses Acts are required to be determined by the verdict of a jury (*a*) may be so determined (1) by a sheriff or other person lawfully acting in his place and a common jury (*b*), or (2) by such person and a special jury (*c*), or (3), in the case of public railways, in such manner as any issue joined in an ordinary action in the High Court may be tried and as a judge of such court may direct (*d*). The particular method to be adopted is at the option of either party (*d*).

If the claimant desires a special jury, he must give notice of such desire to the promoters before they have issued their warrant to the sheriff (*c*); and in the case of public railways either party may at any time before the issue of such warrant apply to a judge of the High Court (*e*) for an order directing the trial of the question in the High Court (*d*).

Character of proceedings.

105. The trial before a special jury is attended in all respects with the like incidents and consequences as in the case of trial by common jury (*f*), and the verdict of the jury and judgment in the High Court as regards costs and every other matter incident to or consequent thereon have the same operation and effect as a verdict and judgment of a sheriff and jury (*g*).

SUB-SECT. 2.—*Issue of Warrant for Jury.*

Notice as to jury.

106. Before the promoters issue their warrant for summoning a jury to settle such question of disputed compensation they must

(*q*) *Collins* v. *South Staffordshire Rail. Co.* (1851), 7 Exch. 5; *Martin* v. *Leicester Waterworks Co.* (1858), 27 L. J. (EX.) 432; and cases cited in note (*r*), *infra*. Where an unqualified person is employed to act as solicitor in the matter, no costs are recoverable (*Fowler* v. *Monmouthshire Rail. and Canal Co.* (1879), 4 Q. B. D. 335).

(*r*) *Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425; *Holdsworth* v. *Wilson* (1863), 4 B. & S. 1.

(*s*) *Capell* v. *Great Western Rail. Co.* (1883), 11 Q. B. D. 345, C. A.

(*t*) *Ferrers (Earl)* v. *Staffordshire and Uttoxeter Rail. Co.* (1872), L. R. 13 Eq. 524.

(*a*) As to the questions so to be determined, see pp. 69, 76, *ante*.

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 39.

(*c*) *Ibid.*, s. 54.

(*d*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 41.

(*e*) The application may be made to a master (R. S. C., Ord. 54, r. 12).

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 55.

(*g*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 43.

give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice they must state what sum of money they are willing to give for the interest in the lands sought to be purchased by them from such party and for the damage to be sustained by him by the execution of the works (*h*). Such offer, if the matter goes before a jury, can be accepted at any time before verdict (*i*). On the receipt of such notice it is still open to the claimant to require the amount of compensation to be settled by arbitration (*k*).

Warrant to summon jury.

107. In all cases when the compensation is required to be determined by the verdict of a jury, other than those which are to be determined by trial in the High Court, the promoters are required and may be compelled to issue their warrant to the sheriff or other proper officer requiring him to summon a jury for that purpose. The warrant should be under the common seal of the promoters if a corporation, or, if not, under their hands and seals or the hands and seals of any two of them (*l*), and should be consistent with the notice to treat (*m*).

Meaning of sheriff.

The term "sheriff" means the sheriff for the place where the lands are situated, and includes the under-sheriff or other legally competent deputy (*n*), but when the lands authorised to be taken are situated within the city and liberty of Westminster, then with respect to those lands the high bailiff of the city and liberty of Westminster or his deputy is substituted for the sheriff as regards the reference to a jury (*o*).

Where sheriff an interested person.

108. If the sheriff be interested in the matter in dispute, such interest being a direct pecuniary one (*p*), the application for a jury is to be made to some coroner of the county in which the lands in question, or some part thereof, are situate (*q*), and not to the under-sheriff (*r*). If the under-sheriff is so interested, the warrant issues to the sheriff, who may proceed himself or appoint a disinterested deputy (*s*). If the sheriff and the coroners be so

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 38. As to the effect of such offer on the costs, see p. 93, *post*. For form of notice, see Encyclopædia of Forms, Vol. VIII., p. 59.

(*i*) *R.* v. *Westminster* (*High Bailiff*), *Ex parte London County Council*, [1903] 2 K. B. 189.

(*k*) *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.* (1872), L. R. 7 Q. B. 776, at pp. 782, 783 ; *Lascelles* v. *Swansea School Board* (1899), 69 L. J. (Q. B.) 24 ; and see p. 69, *ante*.

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 39 ; and as to procedure to compel them to do so, see p. 70, *ante*.

(*m*) *Ex parte Crawshaw Bailey* (1852), Bail Ct. Cas. 66 ; and see *Stone* v. *Commercial Rail. Co.* (1839), 1 Ry. & Can. Cas. 375 ; *R.* v. *Lancaster and Preston Rail. Co.* (1845), 6 Q. B. 759. For Form of warrant, see Encyclopædia of Forms, Vol. VIII., p. 60.

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 3.

(*o*) Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), s. 3.

(*p*) *R.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1867), L. R. 2 Q. B. 336. The verdict may be quashed on the ground of such interest on the part of the sheriff (*ibid.*, and p. 92, *post*)

(*q*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 39.

(*r*) *R.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, *supra*.

(*s*) *Worsley* v. *South Devon Rail. Co.* (1851), 16 Q. B. 539 ; *Ex parte Baddeley* (1849), 5 Ry. & Can. Cas. 542. As to the procedure by deputy, see *R.* v. *Perkin*

SECT. 4. Procedure by Jury.

interested, the application may be made to some person who has filled the office of sheriff or coroner in the county, and who is then living there, and who is not interested in the matter in dispute; and, with respect to such persons, preference must be given to one who has most recently served either of the said offices, and every ex-sheriff, coroner, or ex-coroner has power, if he thinks fit, to appoint a deputy or assessor (*t*). The parties having full knowledge of the facts may, however, agree to waive any objection to the sheriff or other person on the ground of such interest (*u*).

In every case in which the warrant has been directed to any person other than the sheriff, the sheriff must, immediately on receiving notice of the delivery of the warrant, deliver over, on application for that purpose, to the person to whom the warrant has been directed or to any person appointed by him to receive the same, the jurors' book and special jurors' list belonging to the county where the lands in question are situated (*a*).

SUB-SECT. 3.—*Summoning of Common Jury.*

Summoning a common jury.

109. Upon receipt of the warrant to summon a jury the sheriff, in which term is included every coroner or other person lawfully acting in his place (*a*), must summon a jury of twenty-four indifferent persons, duly qualified to act as common jurymen in the High Court, to meet at a convenient time and place to be appointed by him for that purpose (*b*), such time not being less than fourteen nor more than twenty-one days after the receipt of such warrant, and such place not being more than eight miles distant from the lands in question, and he must forthwith give notice to the promoters of the time and place so appointed by him for the inquiry (*c*).

The promoters must then give not less than ten days' notice in writing of such time and place to the other party (*d*). If the party claiming compensation does not appear at the time appointed for the inquiry, such inquiry may not be further proceeded with (*e*).

Impanelling the jury.

110. If such party appears, then out of the jurors appearing upon such summons a jury of twelve persons is required to be drawn by

(1845), 7 Q. B. 165; *Stroud* v. *Watts* (1846), 3 Dow. & L. 799. Where there were two sheriffs, and one was interested, the early practice was to send the application to the other (*Letsom* v. *Bickley* (1816), 5 M. & S. 144).

(*t*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 39.

(*u*) *Ex parte Baddeley* (1849), 5 Ry. & Can. Cas. 542; and see p. 92, *post*.

(*a*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 40.

(*b*) Persons summoned as jurymen, whether common or special, and failing to appear, or refusing to take the oath, or neglecting their duty in the absence of reasonable excuse to the satisfaction of the sheriff, are liable to a penalty not exceeding £10, which is to be applied towards the costs of the inquiry, and are also liable to the same penalties and regulations as juries in the High Court (*ibid.*, s. 44). Jurymen are only liable to serve on a compensation jury once a year (*ibid.*, s. 57); and see title JURIES.

(*c*) *Ibid.*, s. 41.

(*d*) *Ibid.*, s. 46. As to whether such notice may be waived, see *Lang* v. *Glasgow Court House Commissioners* (1871), 9 Macph. (Ct. of Sess.) 768. For form of notice, see Encyclopædia of Forms, Vol. VIII., p. 63.

(*e*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 47. As to how the compensation is to be ascertained in such a case, see *ibid.*, s. 58, and p. 95, *post*.

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the sheriff, or other person lawfully acting in his place (*f*), in such manner as juries for trials of issues joined in the High Court are by law required to be drawn; and if a sufficient number of jurymen do not appear in obedience to such summons, the sheriff or other such person must return other indifferent men, duly qualified to act as jurymen in the High Court, of the bystanders or others that can speedily be procured to make up the jury to the number of twelve; and all parties concerned may have their lawful challenges against any of the jurymen, but no such party may challenge the array (*g*). If no challenge is made, objection cannot be taken to the verdict on the ground of want of qualification on the part of any juryman (*h*).

SUB-SECT. 4.—*Summoning of Special Jury.*

Summoning a special jury.

111. When a special jury is desired by the promoters, or by the other party, and such party has given notice thereof to the promoters before they have issued their warrant to the sheriff, then the promoters must by their warrant require the sheriff to nominate a special jury for the trial of the question. The sheriff or other person acting on his behalf (*i*) must as soon as convenient after receipt of the warrant summon both the parties to appear before him by themselves or their attorneys, at some convenient time and place appointed by him, for the purpose of nominating a special jury, such time not being less than five nor more than eight days from the service of such summons. At the time and place so appointed the sheriff must proceed to nominate and strike a special jury in the manner in which such juries are required by the laws for the time being in force to be nominated or struck by the proper officers of the Supreme Court, and he must appoint a day not later than the eighth day after striking such jury for the parties or their agents to appear before him to reduce the number of such jury, and must give four days' notice thereof to the parties; and on the day so appointed the sheriff must proceed to reduce the said special jury to the number of twenty in the manner used and accustomed by the proper officers of the Supreme Court (*j*).

Impanelling a special jury.

112. The special jury consists of the first twelve of the said twenty who appear on their names being called over, subject to being challenged by the parties. If a full jury does not appear or does not remain after such challenges, then the inquiry may be made by those who do appear if no objection is taken (*k*), but upon

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 40.

(*g*) *Ibid.*, s. 42.

(*h*) *Re Chelsea Waterworks Co., Ex parte Phillips* (1855), 10 Exch. 731; *Cooling* v. *Great Northern Rail. Co.* (1850), 15 Q. B. 486. As to juries and challenges generally, see title JURIES.

(*i*) As to the persons to act when the sheriff is interested, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 39, 40, and p. 87, *ante*.

(*j*) *Ibid.*, s. 54. Irregularities of procedure in summoning a jury will not be a ground for setting aside a verdict (*Re Sheriff of Gloucestershire, Ex parte Great Western Rail. Co.* (1851), 18 L. T. 92; *Re Chelsea Waterworks, Ex parte Phillips* (1855), 24 L. J. (EX.) 79). As to the general practice in summoning etc. juries, see title JURIES. For form of notice of nomination, see Encyclopædia of Forms, Vol. VIII., p. 62.

(*k*) Compare *Ex parte Great Western Rail. Co.* (1851), 18 L. T. 92.

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the application of either party the sheriff must add to the list of such jury the names of any other disinterested persons qualified to act as special or common jurymen who shall not previously have been struck off that list, and who may be attending the court, or can speedily be found, so as to complete such jury, such persons also being subject to challenge. The sheriff must then proceed to trial and adjudication of the matters in question in the like manner and with like incidents and consequences as in the case of a common jury (*l*).

Any other inquiry than that for the trial of which such special jury may have been so struck and reduced may be tried by such jury if the parties consent (*m*).

SUB-SECT. 5.—*Procedure at Inquiry.*

Swearing the jury.

113. The sheriff or other person lawfully acting in his place must preside at the inquiry (*n*), and at the commencement of the proceedings must swear the jury to truly and faithfully inquire of and assess the compensation and damage (*o*).

Claimant is plaintiff.

At the inquiry the party claiming compensation is to be deemed the plaintiff and to have all the rights and privileges to which a plaintiff is entitled in the trial of actions at law (*p*).

View.

If either party so requests in writing, the sheriff is required to order the jury or any six or more of them to view the place or matter in controversy in like manner as views may be had in the trial of actions in the High Court (*q*).

Witnesses.

The sheriff is required to summon before him any person considered necessary to be examined as a witness touching the matters in question, if requested to do so in writing by either party (*p*), and he must administer oaths to all persons called upon to give evidence (*o*). If any person duly summoned to give evidence upon any such inquiry, and to whom a tender of his reasonable expenses has been made, fails to appear at the time and place specified in the summons without sufficient cause, or if any person, whether summoned or not, who shall appear as a witness refuses to be examined on oath touching the subject-matter in question, every person so offending is liable to forfeit to the party aggrieved a sum not exceeding £10 (*r*).

Default of sheriff.

If the sheriff or other person lawfully acting in his place makes default in summoning or impanelling the jury, in giving notice of the time and place of the inquiry, or in presiding at it, or in summoning witnesses, or in ordering a view, he is liable to forfeit a penalty of £50 for every such offence, such penalty to be recoverable by the promoters by action in the High Court, and to be applied in satisfaction of the costs of the inquiry so far as the same will

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 55.
(*m*) *Ibid.*, s. 56.
(*n*) *Ibid.*, s. 43
(*o*) *Ibid.*, s. 48. A witness may affirm instead of taking an oath, Oaths Act, 1888 (51 & 52 Vict. c. 46).
(*p*) *Ibid.*, s. 43.
(*q*) *Ibid.* And as to such views, see R. S. C., Ord. 50, rr. 3, 5.
(*r*) *Ibid.*, s. 45. These forfeitures are recoverable summarily before two justices (*ibid.*, s. 136).

extend (*s*). A mandamus will also be granted ordering the sheriff or such other person to summon a jury and go on with the proceedings if he refuses or neglects to do so (*t*).

Form of verdict.

114. When the inquiry relates to the value of lands to be purchased and also to compensation for injury done or to be done to the lands held therewith, the jury, if required (*a*), must deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works or of any interest therein belonging to the party with whom the question of disputed compensation has arisen or which he is enabled to sell and convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner or otherwise injuriously affecting such lands by the exercise of the special and incorporated Acts (*b*).

SUB-SECT. 6.—*Entering, enforcing, and vacating Judgment.*

The judgment.

115. The sheriff, or other person acting in his place, before whom the inquiry is held, must give judgment for the purchase-money or compensation assessed by the jury (*c*). Such judgment, however, cannot be enforced as a judgment of a court, but is enforced by action (*d*), in which action the claimant's title to the land or his right to compensation can be called in question (*e*). Excess of jurisdiction, unless evident on the face of the verdict or judgment, and other irregularities of procedure, cannot be raised as defences to such actions (*f*).

(*s*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 44.

(*t*) *Galloway* v. *London Corporation* (1866), 12 Jur. (N. S.) 182; *Walker* v. *London and Blackwall Rail. Co.* (1842), 3 Q. B. 744.

(*a*) If the jury are not required by the parties to deliver the verdict separately, a verdict of a lump sum will not be set aside. See *Re London and Greenwich Rail. Co.* (1835), 2 Ad. & El. 678; *Corrigal* v. *London and Blackwall Rail. Co.* (1843), 5 Man. & G. 219; *Re North London Rail. Co., Ex parte Hayne* (1865), 12 L. T. 200; *Re Bradshaw's Arbitration* (1848), 12 Q. B. 562.

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 49, with which compare s. 63. As to the subject-matter of and right to compensation, see pp. 31, 35, *ante*. Juries may award more than the amount claimed, on particular items at least, if the total sum found does not exceed the total sum claimed, and probably they may find a larger sum than that claimed (*Robertson* v. *City and South London Rail. Co.* (1904), 68 J. P. 280).

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 50. If the offer of the promoters is accepted during the inquiry and before verdict, the verdict and judgment should be for the amount of the offer (*R.* v. *Westminster* (*High Bailiff*), *Ex parte London County Council*, [1903] 2 K. B. 189).

(*d*) *Re North London Rail. Co., Ex parte Cooper* (1865), 34 L. J. (CH.) 373; *East and West India Docks and Birmingham Junction Rail. Co.* v. *Gattke* (1851), 3 Mac. & G. 155.

(*e*) See *Read* v. *Victoria Station and Pimlico Rail. Co.* (1863), 32 L. J. (EX.) 167; *Barber* v. *Nottingham and Grantham Rail. and Canal Co.* (1864), 15 C. B. (N. S.) 726; *Re North London Rail. Co., Ex parte Hayne* (1865), 12 L. T. 200; *Healey* v. *Thames Valley Rail. Co.* (1864), 5 B. & S. 769; and see p. 76, *ante*.

(*f*) *Metropolitan Board of Works* v. *Howard* (1889), 5 T. L. R. 732, H. L.; *Long Eaton Recreation Grounds Co.* v. *Midland Rail. Co.*, [1902] 2 K. B. 574, at pp. 580, 585, C. A.; *Mortimer* v. *South Wales Rail. Co.* (1859), 1 E. & E. 375; *Corrigal* v. *London and Blackwall Rail. Co., supra.*

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Exceeding jurisdiction.

116. If there has been excess of jurisdiction, the proper course is to have the verdict and judgment removed into the High Court to be quashed or vacated (*g*). It cannot be so removed and quashed for any other reason (*h*), such as loose direction by the sheriff, improper rejection of evidence, perverseness of finding (*i*), or irregularity in striking the jury (*k*). Excess of jurisdiction may arise from the sheriff not being qualified owing to his having an interest in the matter (*l*), or from compensation being awarded in respect of a matter not a subject of compensation (*m*). In the latter case, if the verdict can be severed so as to distinguish the sum improperly found from the remainder, the verdict may be corrected; otherwise it must be set aside (*n*). Application for a *certiorari* should be made at an early date, and generally it will not be granted after the time allowed for setting aside an award (*o*). If a verdict is quashed, the sheriff must proceed under the old warrant and summon a fresh jury (*p*). It is not open to either party at that stage, should the land be required for a public railway, to have the matter decided by a judge and jury of the High Court (*q*).

Recording judgment.

117. The verdict and judgment must be signed by the sheriff or other person acting in his place (*r*), and after signature it is required for safe custody and facility of proof (*s*) to be kept by the clerk of the peace among the records of the general or quarter sessions of the county in which the lands or any part thereof are situated in respect of which such money or compensation has been awarded; and such verdicts and judgments are deemed records, and they or true copies thereof are good evidence in all courts and elsewhere; and all persons may inspect the said verdicts and judgments and have copies thereof or extracts therefrom on paying for each inspection thereof one shilling, and for every hundred words

(*g*) *Cowper-Essex* v. *Acton Local Board* (1889), 14 App. Cas. 153; *Re Penny and South Eastern Rail. Co.* (1857), 7 E. & B. 660 and cases cited in note (*f*) on p. 91, *ante*.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 145; *Cowper-Essex* v. *Acton Local Board*, *supra*, at pp. 160, 168.

(*i*) *R.* v. *Eastern Counties Rail. Co.* (1843), 3 Ry. & Can. Cas. 466; *R.* v. *London and North Western Rail. Co.* (1854), 3 E. & B. 443; *Streatham and General Estates Co.* v. *Commissioners for Works* (1888), 52 J. P. 615.

(*k*) *Re Sheriff of Gloucestershire, Ex parte Great Western Rail. Co.* (1851), 18 L. T. 92.

(*l*) *R.* v. *London and North Western Rail. Co.* (1863), 12 W. R. 208; *R.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1867), L. R. 2 Q. B. 336.

(*m*) *R.* v. *South Wales Rail. Co.* (1849), 13 Q. B. 988; *R.* v. *London and North Western Rail. Co.* (1854), 3 E. & B. 443; *Caledonian Ry. Co.* v. *Ogilvie* (1856), 2 Macq. 229, H. L.; *Re Penny and South Eastern Rail. Co.*, *supra*; *R.* v. *Scard* (1894), 10 T. L. R. 545.

(*n*) *Caledonian Rail. Co.* v. *Ogilvie*, *supra*; and see *R.* v. *Scard*, *supra*.

(*o*) *R.* v. *South Holland Drainage Committee* (1838), 8 Ad. & El. 429; *R.* v. *Sheward* (1880), 5 Q. B. D. 179; on appeal 9 Q. B. D. 741, C. A.; and see title ARBITRATION, Vol. I., p. 476.

(*p*) *Horrocks* v. *Metropolitan Rail. Co.* (1865), 19 C. B. (N. S.) 139.

(*q*) *Tanner* v. *Swindon Rail. Co.* (1881), 45 L. T. 209.

(*r*) For form of verdict and judgment, see Encyclopædia of Forms, Vol. VIII., p. 64.

(*s*) Recording the judgment does not appear to be necessary to its validity (see *Chabot* v. *Morpeth (Lord)* (1850), 15 Q. B. 458), or to its proof (see *Manning* v. *Eastern Counties Rail. Co.* (1843), 12 M. & W. 243).

copied or extracted therefrom sixpence, which copies or extracts the clerk of the peace is required to make out and to sign and certify as true copies (*t*).

SUB-SECT. 7.—*Costs of Inquiry.*

When promoters to pay costs.

118. When the verdict of the jury is given for a greater sum than that offered by the promoters in their notice to the other party of their intention to cause a jury to be summoned (*u*), then all the costs of the inquiry are borne by the promoters (*a*); but if the verdict is for the same or a less sum than the sum offered in such notice, or if the owner of the land fails to appear at the time and place appointed for the inquiry after receiving due notice thereof, then one half of the cost of summoning, impanelling, and returning the jury and of taking the inquiry and recording the verdict and judgment thereon, if such verdict is taken, is to be defrayed by the owner of the lands, and the other half by the promoters, and each party bears his own costs incident to the inquiry other than those (*b*).

SUB-SECT. 8.—*Taxation and Recovery of Costs.*

Taxation of costs.

119. The costs of the inquiry in the case of difference, and on the application made by petition in a summary way of either party, are required to be settled by a master of the Supreme Court (*c*), who may be ordered by mandamus to settle them if he refuses (*d*); but his taxation, if he does not exceed his jurisdiction, is not open to review by the Supreme Court (*e*). Such costs include all reasonable costs, charges, and expenses incurred in summoning, impanelling, and returning the jury, taking the inquiry, the attendance of witnesses,

(*t*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 50.

(*u*) *Pearson* v. *Great Northern Rail. Co.* (1869), L. R. 7 Q. B. 785, n. The promoters may withdraw their notice and serve another notice with a different offer, but if they do not withdraw the notice, a subsequent offer by them of a larger sum than that for which the verdict is given will not affect the incidence of the costs (*Re Westfield and Metropolitan Rail. Cos., R.* v. *Smith* (1883), 12 Q. B. D. 481, at p. 487; and see *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.* (1872), L. R. 7 Q. B. 782); nor will a previous offer not in the notice (*Re Church and London School Board, R.* v. *Manley-Smith* (1892), 67 L. T. 697). As to costs of inquiries after the land has been entered upon or injuriously affected, see p. 105, *post*.

(*a*) These do not include costs of preliminary negotiations (see *R.* v. *York Justices* (1834), 1 Ad. & El. 828; *R.* v. *Warwickshire (Sheriff)* (1841), 2 Ry. & Can. Cas. 661), but they include the costs of an abortive inquiry which has been quashed, and in consequence of which a second inquiry is necessary (*R.* v. *North London Rail. Co.* (1881), 51 L. J. (Q. B.) 241. Compare *Walker* v. *London and Blackwall Rail. Co.* (1843), 7 Jur. 1154).

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 51; and compare s. 34, p. 84, *ante*, as to costs of arbitrations.

(*c*) *Ibid.*, s. 52; *Covington* v. *Metropolitan District Rail. Co.*, [1903] 1 K. B. 231.

(*d*) *R.* v. *Manley-Smith* (1881), 30 W. R. 272; *Re Church and London School Board, R.* v. *Manley-Smith* (1892), 67 L. T. 197.

(*e*) *Owen* v. *London and North Western Rail. Co.* (1867), L. R. 3 Q. B. 54; *Ross* v. *York, Newcastle, and Berwick Rail. Co.* (1849), 18 L. J. (Q. B.) 199; *Tennant* v. *Belfast Corporation* (1847), 11 I. L. R. 290; *Sandbach Charity Trustees* v. *North Staffordshire Rail. Co.* (1877), 3 Q. B. D. 1, C. A. Compare *Metropolitan Rail. Co.* v. *Turnham* (1863), 32 L. J. (M. C.) 249; *Re Sheffield Waterworks Act* 1864 (1865), L. R. 1 Exch. 54; and see, as to costs of arbitrations, p. 83, *ante*.

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the employment of counsel and solicitors, recording the verdict and judgment, and otherwise incident to the inquiry (*f*); but when the verdict is for the same or a less sum than that offered, the master will only be required to settle such costs as are to be borne equally by the parties (*g*).

Recovering costs.

120. When costs are payable by the promoters, the party entitled should make a final demand for payment, and if within seven days after demand such costs are not paid to him, they may be recovered by distress, and any justice having jurisdiction in the place where the matter arises is required on application to issue his warrant for that purpose, and cannot question the amount settled by the master (*h*).

When the costs are payable by the owner, they may be deducted and retained by the promoters out of the purchase-money or compensation to be paid, and the payment or deposit of the remainder, if any, is to be deemed payment and satisfaction of the whole. If they exceed the amount of the purchase-money or compensation, the excess may be recovered on a justice's distress warrant, obtainable as in the case of the owner's costs (*h*).

SECT. 5.—*Inquiry in the High Court.*

Inquiry by High Court in case of railways.

121. Where land is purchased or taken for the purposes of a public railway, either party may, at any time before the issuing of a warrant to the sheriff (*i*), apply to a master or judge of the High Court (*k*), who is required, if he thinks fit, to make an order for trial of the question in the High Court, upon such terms and in such manner as he deems proper (*l*). The obtaining of such an order by the company and the giving of notice thereof to the other party is a satisfaction of the company's duty in respect of the issue

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 52. A scale of the sheriff's fees for these inquiries was prescribed by an order of 2nd August, 1900, made under the Sheriffs Act, 1887 (50 & 51 Vict. c. 55).

(*g*) *Bray* v. *South Eastern Rail. Co.* (1849), 7 Dow. & L. 307. If the claimant accepts the offer before verdict, the verdict and judgment should be entered for the amount of the offer, and the promoters will be entitled to half the costs of the jury and sheriff (*R.* v. *Westminster* (*High Bailiff*), *Ex parte London County Council*, [1903] 2 K. B. 189, at pp. 194, 196).

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 53. Until this procedure has been tried and failed a mandamus will not issue to compel payment by the promoters (*R.* v. *London and Blackwall Rail. Co.* (1845), 4 Ry. & Can. Cas. 119). The costs may possibly also be recovered by action. Compare *South Eastern Rail. Co.* v. *Richardson* (1852), 21 L. J. (C. P.) 122, Ex. Ch.; *Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425.

(*i*) If the verdict of a sheriff and jury has been set aside, it is then too late to apply for a trial by a judge and jury (*Tanner* v. *Swindon Rail. Co.* (1881), 45 L. T. 209).

(*k*) A master has power to make the order by R. S. C., Ord. 54, r. 12. An appeal lies from him to a judge (*Re Donisthorpe and Manchester, Sheffield and Lincolnshire Rail. Co.*, [1897] 1 Q. B. 671, C. A.), and from a judge to a divisional court (*Long* v. *Great Northern and City Rail. Co.*, [1902] 1 K. B. 813, C. A.). If the application is made to a master before the promoters issue the warrant to the sheriff, the judge or court may, subsequently to such issue, make the order, although the master has refused it (*Re Donisthorpe and Manchester, Sheffield and Lincolnshire Rail. Co., supra*). In practice the application should be made to a master by originating summons in chambers.

(*l*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 41.

of a warrant (*m*). The question in dispute is to be stated in an issue, to be settled in case of difference by the master or judge (*n*) or as he shall direct, and may be entered for trial and tried in the same manner as an issue in an ordinary action at such place as the master or judge directs (*o*). SECT. 5. Inquiry in High Court.

The proceedings are under the control and jurisdiction of the court as in ordinary actions, but the jury, in cases where the issue relates to the value of land purchased and compensation for injury to lands held therewith, may be required to deliver their verdict separately, as in the case of other juries (*o*). The verdict and judgment as regards costs and every other matter incident or consequent thereon have the same operation and are entitled to the same effect as a verdict and judgment by a sheriff and jury (*p*). Thus, a new trial cannot be granted if there is no excess of jurisdiction (*q*); likewise the verdict and judgment merely settle the amount, and are enforced not as a judgment of the High Court, but by action, as in other cases (*r*). Procedure.

SECT. 6.—*Procedure where Parties absent, unknown, or not appearing.*

122. When lands which are required to be purchased or taken belong (1) to a person who, by reason of absence from the United Kingdom, is prevented from treating, or (2) to a person who cannot, after diligent inquiry, be found, or (3) to a person who does not appear at the time appointed for the inquiry before a jury after due notice (*s*), then the compensation is to be determined by the valuation of an able practical surveyor, to be nominated by two justices for that purpose (*t*). Absent parties.

The nomination is made upon the application of the promoters to two justices for the district in which the lands or part thereof are situated, and after proof to their satisfaction that one or other of the above cases has arisen, and it should be by writing under their hands (*u*). The surveyor so nominated must determine the compensation accordingly, and he is required to annex to his valuation a declaration of the correctness thereof (*u*). Before entering on such valuation he must also, in the presence of the said two justices or one of them, make and subscribe a declaration at the foot of the nomination that he Appointment of surveyor.

(*m*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 42.

(*n*) Under the original R. S. C., Ord. 54, r. 12 (d), the issue could not be settled by a master (*Re Donisthorpe and Manchester, Sheffield and Lincolnshire Rail. Co.*, [1897] 1 Q. B. 671, C. A.); but r. 12 (d) was annulled by the R. S. C., June, 1908, and the master now has jurisdiction.

(*o*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 41; and see p. 91, *ante*.

(*p*) *Ibid.*, s. 43.

(*q*) *Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1889), 22 Q. B. D. 435.

(*r*) *Re East London Rail. Co., Oliver's Claim* (1890), 24 Q. B. D. 507, C. A.

(*s*) As to persons not appearing, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 47, and p. 93, *ante*.

(*t*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 58.

(*u*) *Ibid.*, s. 59. As to the matters to which he must have regard in making his valuation, see s. 63, and p. 35, *ante*. For forms of application and nomination, see Encyclopædia of Forms, Vol. VIII., pp. 65, 66.

SECT. 6. Procedure where Parties absent etc.

will honestly make the valuation (*a*). The nomination with the declaration at the foot thereof, and the valuation with declaration of correctness, must be preserved together by the promoters, who must at all times produce them on demand to the owner of the lands comprised in the valuation and to all other parties interested therein (*b*). All the costs of and incident to the valuation are borne by the promoters (*c*).

Payment into bank.

123. The compensation or purchase-money is in these cases to be paid into the Bank of England, in the name and with the privity of the Paymaster-General, to the credit of the parties, and is subject to the control and disposition of the High Court (*d*).

Rights of owners etc.

124. When the compensation has been so ascertained and deposited in the Bank, then, if the owner or party entitled to convey the lands or some interest therein who could not be found or who was absent from the United Kingdom, is dissatisfied with such valuation, he may by notice in writing to the promoters require the question of compensation to be submitted to arbitration, and thereupon it must be submitted to arbitration, as in other cases of disputed compensation (*e*). This notice must be given before he applies to the court for payment or investment of the deposited moneys (*e*).

Arbitration.

The question so to be submitted is as to whether the sum deposited by the promoters was sufficient or whether any, and what, further sum ought to be paid or deposited by them (*f*). If the arbitrators award that a further sum ought to be paid or deposited, then the promoters must pay or deposit, as the case may require, such further sum within fourteen days after the making of the award, or in default the same may be enforced by attachment or recovered with costs by action in the High Court (*g*).

Costs.

If the arbitrators determine that the sum so deposited was sufficient, the costs of and incident to the arbitration are in the discretion of the arbitrators; but if the arbitrators determine that a further sum ought to be paid or deposited by the promoters, all the costs of and incident to the inquiry are to be borne by the promoters (*h*).

(*a*) The declaration is as follows :—

"I, A. B., do solemnly and sincerely declare that I will faithfully, impartially, and honestly, according to the best of my skill and ability, execute the duty of making the valuation hereby referred to me.—A. B.

"Made and subscribed in the presence of ."

The corrupt making of this declaration or the acting contrary thereto after having made it is a misdemeanour (Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 60).

(*b*) *Ibid.*, s. 61.

(*c*) *Ibid.*, s. 62.

(*d*) *Ibid.*, s. 76; and see p. 108, *post.*

(*e*) *Ibid.*, s. 64. For form of such notice, see Encyclopædia of Forms, Vol. VIII., p. 67.

(*f*) *Ibid.*, s. 65.

(*g*) *Ibid.*, s. 66.

(*h*) *Ibid.*, s. 67; and as to taxation and recovery of such costs, see p. 85, *ante.*

Part VIII.—Entry on Lands by Promoters.

SECT. 1. Conditions necessary to Entry.

SECT. 1.—*Conditions necessary to Entry.*

Preliminaries to entry on lands.

125. The promoters of an undertaking may not enter upon the lands which they are by the special and incorporated Acts empowered to take, and which are required to be purchased and permanently used (*i*) for the purposes of these Acts, except with the consent of the owners and occupiers (*k*), or until they shall either have paid to every party having an interest in such lands, or deposited in the Bank in the manner provided in the special and incorporated Acts (*l*), the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein (*m*). This prohibition as to entry is, however, subject to two provisoes (*n*).

Surveying.

One proviso is that for the purpose merely of surveying and taking levels of such lands, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, it shall be lawful for the promoters of the undertaking, after giving not less than three nor more than fourteen days' notice to the owners or occupiers thereof, to enter upon such lands without previous consent, making compensation for any damage thereby occasioned to the owners or occupiers thereof (*o*).

Giving security.

The other proviso is that the promoters may enter and use the land without having first paid or deposited the purchase-money or compensation upon making certain deposits in the Bank of England by way of security and giving bonds (*p*).

Unauthorised entry.

126. If the promoters enter without complying with any of these conditions, they may be sued in trespass for damages (*q*), or for ejectment (*r*), and an injunction may be granted to restrain them from remaining in possession or using the land until they have complied with the necessary conditions (*s*). Such proceedings will

(*i*) Under certain Acts land may be required for temporary purposes, *e.g.*, Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 30—44.

(*k*) For a temporary purpose the consent of the occupier may be sufficient (*Standish* v. *Liverpool Corporation* (1852), 1 Drew. 1).

(*l*) See p. 109, *post*.

(*m*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 84.

(*n*) *Ibid.*, and s. 85.

(*o*) *Ibid.*, s. 84. The court will not grant an injunction to restrain entry for these purposes, although no notice has been given, if the promoters undertake not to proceed except upon giving the proper notices (*Fooks* v. *Wilts, Somerset, and Weymouth Rail. Co.* (1846), 4 Ry. & Can. Cas. 210).

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85; and see p. 99, *post*.

(*q*) *Ramsden* v. *Manchester South Junction and Altrincham Rail. Co.* (1848), 1 Exch. 723.

(*r*) *Stretton* v. *Great Western Rail. Co.* (1870), 5 Ch. App. 751; *Salisbury (Marquis)* v. *Great Northern Rail. Co.* (1858), 5 C. B. (N. S.) 174; and see also *Martin* v. *London, Chatham, and Dover Rail. Co.* (1866), 1 Ch. App. 501.

(*s*) *Ranken* v. *East and West India Docks* (1849), 12 Beav. 298; *Perks* v. *Wycombe Rail. Co.* (1862), 10 W. R. 788; *Cardwell* v. *Midland Rail. Co.* (1904), 21 T. L. R. 22, C. A.; and see *Goodson* v. *Richardson* (1874), 9 Ch. App. 221; *Marriott* v. *East Grinstead Gas and Water Co.* (1908), *Times*, Nov. 11;

SECT. 1. **Conditions necessary to Entry.**

not lie, however, at the instance of a person who has consented to the entry, but who subsequently desires to withdraw his consent (*t*), and this consent may be presumed from the conduct of such person (*a*), but otherwise they will lie at the instance of any person having a legal or equitable interest in the land (*b*), unless his interest has by a *bonâ fide* mistake been omitted to have been purchased, in which case the promoters may remain in possession for a certain time to enable them to purchase the interest (*c*).

Penalties for unauthorised entry.

Further, if the promoters or their contractors wilfully enter and take possession except upon the above conditions, the promoters will forfeit to the party in possession of the lands entered upon the sum of £10 over and above the amount of any damage done to such lands by reason of such entry and taking possession, the penalty and damage respectively to be recovered before a court of summary jurisdiction (*d*). If the promoters or their contractors after conviction in such penalty continue in unlawful possession of any such lands, the promoters are liable to forfeit the sum of £25 for every day they or their contractors shall so remain in possession, such penalty to be recoverable by the party in possession of such lands, with costs, by action in any of the superior courts (*e*).

Recovery of penalties.

At the trial of any such action the decision of the court of summary jurisdiction is not to be held conclusive as to the right of entry by the promoters (*f*). The entry will not be deemed wilful, and the penalties will not be recoverable, if the entry has been made under a mistaken idea that the conditions had been complied with (*g*), or if the promoters have *bonâ fide* and without collusion paid the compensation agreed or awarded to be paid in respect of the said lands to any person whom they may have reasonably believed to be entitled thereto, or have deposited the same in the Bank of England for the benefit of the parties interested in the lands, or made the deposit by way of security in respect thereof, although such person may not have been legally entitled thereto (*h*).

Deere v. *Guest* (1836), 1 My. & Cr. 516; *Lind* v. *Isle of Wight Ferry Co.* (1862), 1 New Rep. 13; *Wood* v. *Charing Cross Rail. Co.* (1863), 33 Beav. 290; *Armstrong* v. *Waterford and Limerick Rail. Co.* (1846), 10 I. Eq. R. 60.

(*t*) *Doe* d. *Hudson* v. *Leeds and Bradford Rail. Co.* (1851), 16 Q. B. 796; *Knapp* v. *London, Chatham, and Dover Rail. Co.* (1863), 11 W. R. 890; and see *Langford* v. *Brighton, Lewes, and Hastings Rail. Co.* (1845), 4 Ry. & Can. Cas. 69.

(*a*) *Greenhalgh* v. *Manchester and Birmingham Rail. Co.* (1838), 3 My. & Cr. 784; and see *Salisbury* (*Marquis*) v. *Great Northern Rail. Co.* (1858), 5 C. B. (N. S.) 174.

(*b*) *Martin* v. *London, Chatham, and Dover Rail. Co.* (1866), 1 Ch. App. 501; *Rogers* v. *Hull Dock Co.* (1864), 34 L. J. (CH.) 165; *Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1888), 40 Ch. D. 268.

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 124—126; and see p. 151, *post*. As to entry in order to secure the public safety, see *Tower* v. *Eastern Counties Rail. Co.* (1843), 3 Ry. & Can. Cas. 374.

(*d*) *Ibid.*, s. 89; and as to recovering these penalties, see ss. 136, 138, 140, 141, 145.

(*e*) *Ibid.*

(*f*) *Ibid.*, s. 90.

(*g*) *Steele* v. *Midland Rail. Co.* (1869), 21 L. T. 387; *Hutchinson* v. *Manchester, Bury, and Rossendale Rail. Co.* (1846), 15 M. & W. 314.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 89. As to

SECT. 1. Conditions necessary to Entry.

Easements.

127. The destruction of an easement is not an entry (*i*), but if the promoters are authorised by the special Act to enter upon land for the purpose of acquiring an interest therein, such as the appropriation and use of the subsoil in order to make a tunnel, they can only make such entry on the above-stated conditions (*k*). Some special Acts authorise the entry on land in order to acquire certain rights and to do certain work, as, for example, to lay pipes (*l*), in which cases the promoters can enter without complying with the above conditions (*m*).

SECT. 2.—*Entry before Purchase or Payment.*

SUB-SECT. 1.—*Deposit and Bond.*

Deposit of security.

128. When the promoters are desirous of entering upon and using any of the authorised lands which they require to purchase and permanently take, before an agreement has been come to, or an award made, or verdict given for the purchase-money or compensation to be paid by them in respect of such lands, they may do so, without having first paid or deposited the purchase-money or compensation, on the terms of depositing security and giving a bond. They must deposit in the Bank of England by way of security either the amount of purchase-money or compensation claimed by any party who does not consent to such entry, or such a sum as shall be determined by a surveyor to be the value of such lands, or of the interest therein which such party is entitled to or enabled to sell and convey (*n*).

If the promoters give notice to treat for part only of a house, building, or factory, and they are required by the owner to take the whole, they can only enter after depositing the value of the whole (*o*). When one notice to treat has been served in respect of several parcels of land the promoters before entering on some only of the parcels must deposit the estimated value of all (*p*).

Appointment of surveyor.

129. When the undertaking is other than a railway, the surveyor is to be appointed by two justices in the manner provided in the

granting an injunction in such cases, see *Wood* v. *Charing Cross Rail. Co.* (1863), 33 Beav. 290; *Garrett* v. *Banstead and Epsom Downs Rail. Co.* (1864), 13 W. R. 878; *Munro* v. *Wivenhoe and Brightlingsea Rail. Co.* (1865), 13 W. R. 880, C. A.

(*i*) *Clark* v. *London School Board* (1874), 9 Ch. App. 120; *Bush* v. *Trowbridge Waterworks Co.* (1875), L. R. 19 Eq. 291; and see p. 65, *ante*.

(*k*) *Hill* v. *Midland Rail. Co.* (1882), 21 Ch. D. 143; *Farmer* v. *Waterloo and City Rail. Co.*, [1895] 1 Ch. 527; *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787. As to the meaning of the expression "appropriate and use," see *Metropolitan Rail. Co.* v. *Fowler*, [1893] A. C. 416; and as to the meaning of "take," see *Spencer* v. *Metropolitan Board of Works* (1882), 22 Ch. D. 142, C. A.

(*l*) *E.g.*, Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 54.

(*m*) *Roderick* v. *Aston Local Board* (1877), 5 Ch. D. 328, C. A., and cases cited pp. 22, 32, *ante*.

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85.

(*o*) *Giles* v. *London, Chatham, and Dover Rail. Co.* (1861), 30 L. J. (CH.) 603; *Underwood* v. *Bedford and Cambridge Rail. Co.* (1861), 7 Jur. (N. S.) 941; *Gardner* v. *Charing Cross Rail. Co.* (1861), 2 John. & H. 248; and see p. 70, *ante*.

(*p*) *Barker* v. *North Staffordshire Rail. Co.* (1848), 5 Ry. & Can. Cas. 401; *Ford* v. *Plymouth, Devonport, and South Western Junction Rail. Co.*, [1887] W. N. 201.

SECT. 2. Entry before Purchase or Payment.

case of parties who cannot be found (*q*), that is, on the application of the promoters and without notice to the landowner (*r*). In the case of railway companies, the surveyor must be appointed by the Board of Trade, but the provisions applicable to a surveyor appointed by justices apply to a surveyor so appointed by the Board of Trade (*s*), with the addition that before the company apply to the Board of Trade to make the appointment they must give not less than seven days' notice of their intention to apply to any party interested in or entitled to sell and convey the lands in question who has not consented to the entry (*t*).

Duty of surveyor.

130. The value of the land to be so determined should, in regard to all undertakings, include the damage by severance or other injurious affection so far as the same can be estimated as well as the value of the land itself (*a*). The surveyor should determine the amount in the same manner as in the case of absent parties, and should properly examine the premises, so as to form a fair judgment (*b*); if he does so *bonâ fide*, the fact that the sum is inadequate, or that he did not know the facts sufficiently, will not invalidate his valuation (*c*). When the promoters are authorised to purchase a right in land the surveyor determines only the value of that right, and not of the whole land (*d*). In the case of the purchase of land without minerals, the value of the minerals would be excluded (*e*). In estimating the value of a manufactory the trade fixtures and machinery should be included (*f*).

Payment into Bank.

131. The deposit is made by paying the money into the Bank of England in the name and with the privity of the Paymaster-General for and on behalf of the Supreme Court of Judicature (*g*),

(*q*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 59; and p. 95, *post*.

(*r*) *Bridges* v. *Wilts, Somerset, and Weymouth Rail. Co.* (1847), 16 L. J. (CH.) 335; *Langham* v. *Great Northern Rail. Co.* (1848), 1 De G. & Sm. 486; and see S. C. (1847), 5 Ry. & Can. Cas. 263, at p. 266.

(*s*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 36 (1).

(*t*) *Ibid.*, s. 36 (2). As to complying with these provisions, see *Field* v. *Carnarvon and Llanberis Rail. Co.* (1867), L. R. 5 Eq. 190. For applicable forms, see Encyclopædia of Forms, Vol. VIII., p. 45.

(*a*) *Field* v. *Carnarvon and Llanberis Rail. Co., supra;* and Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 36 (3).

(*b*) *Cotter* v. *Metropolitan Rail. Co.* (1864), 12 W. R. 1021. See also *Barker* v. *North Staffordshire Rail. Co.* (1848), 5 Ry. & Can. Cas. 401; *Stamps* v. *Birmingham, Wolverhampton, and Stour Valley Rail. Co.* (1848), 7 Hare, 251, at p. 256. As to valuation in the case of absent parties, see p. 95, *ante*.

(*c*) *River Roden Co.* v. *Barking Town Urban Council*, [1902] W. N. 86, 103, C. A.

(*d*) *Hill* v. *Midland Rail. Co.* (1882), 21 Ch. D. 143; and see *Lambert* v. *Dublin, Wicklow, and Wexford Rail. Co.* (1890), 25 L. R. Ir. 163.

(*e*) *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1882), 22 Ch. D. 25, at pp. 42, 43, C. A., and (1884) 9 App. Cas. 480; *Ex parte Neath and Brecon Rail. Co.* (1876), 2 Ch. D. 201.

(*f*) *Gibson* v. *Hammersmith Rail. Co.* (1863), 11 W. R. 299.

(*g*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 86; Supreme Court of Judicature (Funds etc.) Act, 1883 (46 & 47 Vict. c. 29); and for procedure, see Supreme Court Funds Rules, 1905. When the office of the Paymaster-General is closed, and his authority in respect of the payment in cannot be obtained, the money may be paid into the Bank on the terms and conditions set out in s. 88 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

to be placed to his account there, to the credit of the parties interested in or entitled to sell and convey the lands so to be entered upon, and who shall not have consented to such entry, subject to the control and disposition of the said court (*h*). Upon such deposit being made the cashier must give to the promoters, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what purpose and to whose credit the same has been paid in (*h*).

Bond must be given.

132. In addition to making the deposit, the promoters must give or tender to the non-consenting party a bond under their common seal if they are a corporation, or if not, then under the hands and seals of them or any two of them, with two sufficient sureties, in a penal sum equal to the sum to be deposited, conditioned for payment to such party or for deposit in the Bank for the benefit of the parties interested in such lands, as the case may require, of all such purchase-money or compensation as may in manner provided in the special and incorporated Acts be determined to be payable by the promoters in respect of the lands so entered upon, together with interest thereon, at the rate of £5 per cent. per annum, from the time of entering on such lands until such purchase-money or compensation shall be paid to such party or deposited in the Bank for the benefit of the parties interested in such lands under the provisions of the Lands Clauses Acts (*i*). In case the parties differ, but not otherwise (*k*), the sureties are to be approved of by two justices (*l*), except in the case of railways, when they are to be approved of by the Board of Trade after hearing the parties (*m*).

Remedies on default.

133. If the bond and deposit are not made in accordance with the Act, an injunction will be granted restraining the promoters from remaining in possession (*n*), but time will be given to enable them to comply with the provisions of the Act in cases of error or mistake (*o*). Money should be deposited and a bond given in respect of all the interests in the land (*n*). Promoters may, however, deal with a person presumably having a beneficial interest

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 86. The addition of the words "*ex parte* the promoters" will not invalidate the account (*Poynder* v. *Great Northern Rail. Co.* (1847), 16 Sim. 3).

(*i*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85. As to variations and additions in the form of the bond, see *Hosking* v. *Phillips* (1848), 3 Exch. 168; *Poynder* v. *Great Northern Rail. Co.* (1847), 2 Ph. 330; *Langham* v. *Great Northern Rail. Co.* (1848), 5 Ry. & Can. Cas. 263; *Cotter* v. *Metropolitan Rail. Co.* (1864), 12 W. R. 1021; *Willey* v. *South Eastern Rail. Co.* (1849), 1 Mac. & G. 58. For a form of bond, see Encyclopædia of Forms, Vol. VIII., p. 46.

(*k*) *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1882), 22 Ch. D. 25, at p. 41.

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85.

(*m*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 36 (4).

(*n*) Thus, it is not enough to deposit money in the name of the mortgagor and to give a bond to him only to the exclusion of the mortgagee (*Ranken* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1849), 12 Beav. 298).

(*o*) *Poynder* v. *Great Northern Rail. Co.* (1847), 2 Ph. 330; *Willey* v. *South Eastern Rail. Co.*, *supra*.

SECT. 2. Entry before Purchase or Payment.

as having that interest, although he cannot then be required to make a good title (*p*).

SUB-SECT. 2.—*Time and Mode of Entry.*

When entry may be made.

134. Entry upon making a deposit and giving a bond is not an exercise of the powers of compulsory purchase (*q*). The service of a notice to treat is probably necessary before the power of entry can be exercised (*r*), and if such a notice is served within the time limited for the exercise of the powers of compulsory purchase, entry may be made after the expiration of that period, at any rate up to the limit of time prescribed for the construction of the works (*q*). The promoters may also exercise the power although there is no urgent necessity for immediate entry (*s*), and the power to enter includes the power to use the land (*q*). If promoters enter presumably under this power, but acting *ultra vires*, such entry will not assist their title, and will render them liable in damages (*t*).

Delivering possession.

135. When the promoters of the undertaking are authorised under the special Act to enter upon and take possession of lands required for the purposes of the undertaking, and the owner or occupier of any such lands or any other person refuses to give up possession, or hinders the promoters from entering upon or taking possession, the promoters may enter peaceably (*a*) or issue their warrant to the sheriff to deliver possession of the lands to the person appointed in such warrant to receive the same, and upon receipt of such warrant the sheriff must deliver possession of such lands accordingly (*b*).

Costs.

The costs accruing by reason of the issuing and execution of such warrant are to be settled by the sheriff and paid by the person refusing to give possession, and the amount of such costs is to be deducted and retained by the promoters from the compensation, if any, then payable by them to such person; or, if no such compensation be payable to such person, or if the same be less than such costs, then such costs or the excess thereof beyond such compensation, if not paid on demand, are to be levied by distress, and upon application to any justice for that purpose he is required to issue his warrant accordingly (*b*). If the compensation has been paid into court, the costs may be ordered to be paid out of the fund in court (*c*).

(*p*) *Willey* v. *South Eastern Rail. Co.* (1849), 1 Mac. & G. 58.

(*q*) *Salisbury* (*Marquis*) v. *Great Northern Rail. Co.* (1852), 17 Q. B. 840; *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480, at pp. 488, 495; *Doe* d. *Armitstead* v. *North Staffordshire Rail. Co.* (1851), 16 Q. B. 526.

(*r*) *Tiverton and North Devon Rail. Co.* v. *Loosemore*, *supra*, at p. 501; *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, at pp. 805, 810.

(*s*) *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1882), 22 Ch. D. 25, at pp. 39, 46, C. A., disapproving *Field* v. *Carnarvon and Llanberis Rail. Co.* (1867), L. R. 5 Eq. 190.

(*t*) *Batson* v. *London School Board* (1903), 67 J. P. 457.

(*a*) *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1882), 22 Ch. D. 25, at p. 41, C. A., on appeal (1884) 9 App. Cas. 480.

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 91.

(*c*) *Re Schmarr*, [1902] 1 Ch. 326, at p. 331; *Re Turner's Estate and the Metropolitan Railway Act*, 1860 (1861), 5 L. T. 524.

SUB-SECT. 3.—*Application of Deposit.*

SECT. 2.
Entry before Purchase or Payment.

Dealing with deposit.

136. The money so deposited must remain in the Bank by way of security to the parties whose lands have been entered upon, for the performance of the condition of the bond given to them, and such money may, on application by petition or summons at the instance of the promoters (*d*), be ordered to be invested in such stocks, funds, or securities as are authorised in respect of cash under the control of the court (*e*), and upon the condition of the bond being fully performed the promoters, upon a like application (*f*) to the Chancery Division of the High Court (*g*), are entitled to an order (*h*) that the money so deposited or the funds in which it has been invested, together with the accumulation thereof, be repaid or transferred to them, or if such condition shall not be fully performed the said court may order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same was deposited (*i*). In order that the money should be repaid it is not necessary that all questions between the parties should be settled, as, for example, the payment of costs (*k*). It is enough that the condition of the bond has been performed, either by payment to the person to whom the bond was given (*l*) or, in case of refusal by him, into the Bank (*m*). If the undertaking is abandoned, the promoters with the consent of the landowner will be entitled to have the money repaid to them (*n*). If the condition of the bond is not performed, the landowner will be entitled, on an application by him, to the court, to have the money paid out to him (*o*). If the price has been fixed by agreement or otherwise, he may also bring a suit for specific performance (*p*), or he may enforce his lien on the land as an ordinary vendor, in which case the money in court will be paid in respect of the purchase price (*q*).

(*d*) See R. S. C., Ord. 55, r. 2 (7), as to procedure.

(*e*) R. S. C., Ord. 22, r. 17; and see Part XI., p. 114, *post.*

(*f*) R. S. C., Ord. 55, r. 2 (2).

(*g*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34.

(*h*) *Re Neath and Brecon Rail. Co.* (1874), 9 Ch. App. 263; *Martin* v. *London, Chatham, and Dover Rail. Co.* (1866), 1 Ch. App. 501.

(*i*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 87; and as to costs, see *ibid.*, s. 80, and pp. 124, 126, *post.*

(*k*) *Re London and South Western Railway Extension Act, Ex parte Stevens* (1848), 2 Ph. 772; *Ex parte Great Northern Rail. Co* (1848), 16 Sim. 169; *Re Wimbledon and Dorking Railway Act*, 1857 (1863), 9 L. T. 703.

(*l*) *Ex parte Midland Rail. Co.*, [1904] 1 Ch. 61, C. A.

(*m*) *Ex parte Midland Rail. Co., supra; Re Fooks* (1849), 2 Mac. & G. 357. For an example where it had not been performed, see *Ex parte London and South Western Rail. Co.* (1869), 38 L. J. (CH.) 527. As to the evidence necessary to show that the condition has been performed, see *Re London and North Western Rail. Co.* (1872), 26 L. T. 687; *Ex parte Midland Rail. Co.*, [1894] W. N. 38. As to service of summons or petition and appearance, see R. S. C., Ord. 65, r. 27 (19).

(*n*) *Ex parte Birmingham, Wolverhampton, and Dudley Rail. Co.* (1863), 1 Hem. & M. 772.

(*o*) *Re Mutlow's Estate* (1878), 10 Ch. D. 131.

(*p*) *Jersey (Earl)* v. *Briton Ferry Floating Dock Co.* (1869), L. R. 7 Eq. 409.

(*q*) *Walker* v. *Ware, Hadham, and Buntingford Rail. Co.* (1865), L. R. 1 Eq. 195; *Betty* v. *London, Chatham, and Dover Rail. Co.*, [1867] W. N. 169; *Wing* v. *Tottenham and Hampstead Junction Rail. Co.* (1868), 3 Ch. App. 740.

SECT. 2. Entry before Purchase or Payment.

If the price fixed is larger than the sum in court, and there is delay in completion, the landowner is entitled to have the amount of the deposit increased until it is equal to the price (*r*).

Part IX.—Assessment of Compensation after Entry or Injurious Affection.

SECT. 1.—*Under the Lands Clauses Acts.*

Methods of assessment.

137. When land has been entered upon or taken before the purchase price or compensation has been settled, or when it has been injuriously affected by the execution of the works, the compensation is assessed under the Lands Clauses Acts by the same methods as compensation before entry, subject, however, to certain variations.

Where claim does not exceed £50.

When the amount of compensation claimed in such cases does not exceed £50 it is settled by two justices, on the application of either party, in the same way as before entry (*s*). When lands have been taken which have been in the possession of a person having no greater interest therein than as a tenant for a year or from year to year, and if such person has been required to give up possession of the whole or part before the expiration of his term or interest therein, the compensation in respect of such interest is also settled by two justices (*t*), but if the claim in respect of such an interest is merely for injuriously affecting and exceeds £50, justices have no jurisdiction (*a*).

When over £50.

In other cases, the party entitled to compensation in respect of lands or of any interest therein may have the same settled at his option either by arbitration or by the verdict of a jury (*b*). It is he, and not the promoters, who should take the initiative to have the amount assessed (*c*).

By arbitration.

138. If he desires to have the same settled by arbitration, he must give notice in writing to the promoters of his desire, stating in such notice the nature of the interest in the lands in respect of which he claims compensation and the amount of the compensation claimed (*d*). Then, unless the promoters are willing

(*r*) *Ashford* v. *London, Chatham, and Dover Rail. Co.* (1866), 14 L. T. 787; *Ex parte London, Tilbury, and Southend Rail. Co.* (1853), 1 W. R. 533.

(*s*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 22, 24; *R.* v. *St. Luke's, Chelsea* (1871), L. R. 7 Q. B. 148, at p. 152; and see p. 77, *ante*.

(*t*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121; *R.* v. *Manchester etc. Rail. Co.* (1854), 4 E. & B. 88; *Knapp* v. *London, Chatham, and Dover Rail. Co.* (1863), 32 L. J. (EX.) 236; and see p. 148, *post*.

(*a*) *R.* v. *Sheriff of Middlesex* (1862), 10 W. R. 717.

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68.

(*c*) *Doe* d. *Armitstead* v. *North Staffordshire Rail. Co.* (1851), 20 L. J. (Q. B.) 249; *Adams* v. *London and Blackwall Rail. Co.* (1850), 19 L. J. (CH.) 557.

(*d*) As to the nature of such particulars, see *Healey* v. *Thames Valley Rail. Co.* (1864), 13 W. R. 44, and p. 68, *ante*. For an applicable form, see Encyclopædia of Forms, Vol. VIII., p. 68.

to pay the amount so claimed and enter into a written agreement for that purpose within twenty-one days after receipt of such notice, the same must be settled by arbitration in the manner hereinbefore set out (*e*), and subject to the like incidents as to costs and otherwise (*f*).

By a jury.

139. If the party entitled to compensation desires to have the matter settled by a jury, he must similarly give notice in writing of his desire to the promoters, giving the like particulars as to his interest and claim. Then, unless the promoters are willing to pay the amount so claimed and enter into a written agreement for that purpose, they are required within twenty-one days after receipt of such notice to issue their warrant to the sheriff to summon a jury for settling the same in the manner hereinbefore stated (*g*). The amount may, at the option of the parties, be assessed by a sheriff and a common or special jury, or in the case of public railways in the manner in which an issue in the High Court is tried (*h*). The provisions regulating the procedure and other incidents, including costs, apply to these inquiries so far as the same are applicable (*i*). The provision as to the notice which the promoters are required to give of their intention to summon a jury in cases before the land is taken does not apply to cases where the land has been taken or injuriously affected, because in the latter case the initiative is taken by the claimant (*j*). The provisions as to the incidence of the costs (*k*) are, however, applicable (*l*), with the variation that the time before which the promoters may make an offer is the date of giving the ten-day notice of the time and place of the inquiry (*m*). In cases where the claim to compensation for injurious affection, as made before the jury, is either wholly or in part unsustainable, the claimant is entitled to no costs of the inquiry in respect of so much as is invalid (*n*).

(*e*) P. 78, *ante*.

(*f*) *Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425 ; *Yates* v. *Blackburn Corporation* (1860), 29 L. J. (EX.) 447 ; *South Eastern Rail. Co.* v. *Richardson* (1852), 15 C. B. 810, at p. 820, Ex. Ch. Provisions in statutes for the protection of public authorities requiring proceedings to be taken within a limited time do not apply to proceedings to obtain compensation (*Delany* v. *Metropolitan Board of Works* (1867), L. R. 2 C. P. 532, p. 536, affirmed L. R. 3 C. P. 111, Ex. Ch.)

(*g*) See note (*d*), p. 104, *ante*.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 39, 54 ; Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 41 ; and see p. 86, *ante*.

(*i*) *South Eastern Rail. Co.* v. *Richardson* (1852), 15 C. B. 810, Ex. Ch.

(*j*) *Railston* v. *York, Newcastle, and Berwick Rail. Co.* (1850), 15 Q. B. 404 ; *Hayward* v. *Metropolitan Rail. Co.* (1864), 33 L. J. (Q. B.) 73.

(*k*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 51, p. 93, *ante*.

(*l*) *South Eastern Rail. Co.* v. *Richardson*, *supra*.

(*m*) *Hayward* v. *Metropolitan Rail. Co.*, *supra* ; *Re Westfield and Metropolitan Rail. Co.*, *R.* v. *Smith* (1883), 12 Q. B. D. 488 ; *Re Church and London School Board*, *R.* v. *Manley-Smith* (1892), 67 L. T. 197 ; Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 46.

(*n*) *Todd* v. *Metropolitan District Rail. Co.* (1871), 19 W. R. 720 ; *Sharpe* v. *Metropolitan Rail. Co.* (1879), 4 Q. B. D. 652, C. A. It is otherwise if the

SECT. 1. Under the Lands Clauses Acts.

Default of promoters.

140. If the promoters make default in issuing their warrant to a sheriff to summon a jury within the twenty-one days when so required, or if in railway cases no application is made for trial in the High Court within that time (*o*), the promoters become liable to pay to the person entitled to compensation the amount of the compensation so claimed, and the same may be recovered by him, with costs, by action in the High Court (*p*). The period of twenty-one days is not extended by a subsequent request from the owner for a special jury, if such request is delivered before the promoters shall have issued their warrant to the sheriff (*q*). In order that the action may lie in the case of land taken, possession of the land must actually have been taken (*r*).

SECT. 2.—*Under other Acts.*

In special cases.

141. When land is injuriously affected or interfered with under provisions to which the Lands Clauses Acts are not applicable (*a*), there will generally be found in the Act authorising the interference provisions for determining the compensation payable (*b*). When a particular tribunal has been appointed to assess the compensation, and such tribunal has ceased to exist, the person injured is entitled to have the compensation assessed in and enforced by an action (*c*).

Part X.—Conveyance of Land and Payment of Purchase-money.

SECT. 1.—*Completion of the Purchase.*

SUB-SECT. 1.—*Specific Performance.*

When relation of vendor and purchaser established.

142. When notice to treat has been served or land has been entered upon pursuant to the Lands Clauses Acts, and the price or

invalidity arises subsequently from want of title (*Capell* v. *Great Western Rail. Co.* (1882), 9 Q. B. D. 459, at p. 461).

(*o*) *Eaton* v. *Midland Great Western Rail. Co.* (1847), 10 I. L. R. 310; *Tanner* v. *Swindon etc. Rail. Co.* (1881), 45 L. T. 209.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68; and see *Adams* v. *London and Blackwall Rail. Co.* (1850), 2 Mac. & G. 118.

(*q*) *Glyn (Bart.)* v. *Aberdare Rail. Co.* (1859), 28 L. J. (C. P.) 271.

(*r*) *Burkinshaw* v. *Birmingham and Oxford Junction Rail. Co.* (1850), 20 L. J. (EX.) 246. Thus, notice of intention to enter, coupled with the making of a deposit and giving of a bond, is not enough, if entry is not in fact made (*Re Church and London School Board, R.* v. *Manley-Smith* (1892), 67 L. T. 197), but obtaining the key of premises from a tenant may amount to a taking (*Barker* v. *Metropolitan Rail. Co.* (1864), 17 C. B. (N. S.) 785). Compare *Standish* v. *Liverpool Corporation* (1852), 1 Drew. 1. As to the meaning of "taking" compare *Spencer* v. *Metropolitan Board of Works* (1882), 22 Ch. D. 142, C. A.; and see as to entry, p. 97, *ante*. As to land taken by mistake, see p. 151, *post*.

(*a*) As, for example, when pipes or sewers are laid under the powers in the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 54.

(*b*) *Ibid.*, s. 308; and see Part XIV., p. 153, *post*, generally, for such provisions.

(*c*) *Bentley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1891] 3 Ch. 222.

SECT. 1. Completion of the Purchase.

compensation has been ascertained either by agreement or assessment, the relation of vendor and purchaser is established between the parties in the same way as under a formal agreement, and all the ordinary rules apply, unless the special Act contains provisions to the contrary (*d*).

Specific performance.

Either the vendor (*e*) or the promoters (*d*) can accordingly enforce the contract by specific performance, but the owner must show that he has a good title to the land, and specific performance will therefore only be granted subject to his title being investigated and proved (*f*). He must also be prepared to execute a conveyance, and it will be an answer to an action for the price that the conveyance had not been executed (*g*). When there is no question as to title, he can compel the promoters to execute a conveyance (*h*) or accept an assignment of a lease with all proper covenants (*i*), even although they may have already paid the purchase-money. After a good title is shown and possession is offered the promoters will be liable to pay interest on the purchase-money (*k*).

SUB-SECT. 2.—*Refusal to convey or Failure to make Title.*

Completion under statute on default of owner.

143. The promoters have also a statutory means of completing the purchase of the land, or of any interest therein, if the owner on tender of the purchase-money or compensation, whether agreed or assessed, refuses to accept the same (*l*), or neglects or fails to make out a title to the satisfaction of the promoters, or if he refuses to convey or release the lands as directed by the promoters. In such cases the promoters may deposit the purchase-money or compensation in the Bank of England, in the name and with the privity of the Paymaster-General for and on behalf of the Supreme Court of Judicature (*m*), to be placed to his account there to the credit of the parties interested in the lands (describing them so far as the promoters of the undertaking can do so), subject to the control and disposition of the said court (*n*). Upon such deposit

(*d*) *Regent's Canal Co.* v. *Ware* (1857), 23 Beav. 575; *Mason* v. *Stokes Bay Pier and Rail. Co.* (1862), 32 L. J. (CH.) 110; and see, generally, title SALE OF LAND.

(*e*) *Adams* v. *London and Blackwall Rail. Co.* (1850), 2 Mac. & G. 118.

(*f*) *Gunston* v. *East Gloucestershire Rail. Co.* (1868), 18 L. T. 8.

(*g*) *East London Union* v. *Metropolitan Rail. Co.* (1869), L. R. 4 Exch. 309, following the general principle in *Laird* v. *Pim* (1841), 7 M. & W. 474; and see *Douglass* v. *London and North Western Rail. Co.* (1857), 3 K. & J. 173.

(*h*) *Re Cary-Elwes' Contract*, [1906] 2 Ch. 143.

(*i*) *Harding* v. *Metropolitan Rail. Co.* (1872), 7 Ch. App. 154.

(*k*) *Re Piggott and Great Western Rail. Co.* (1881), 18 Ch. D. 146.

(*l*) If the parties by reason of any disability are unable to accept the purchase-money, this is not a refusal, although other parties might complete for them (*Re Leeds Grammar School*, [1901] 1 Ch. 228).

(*m*) The Paymaster-General for and on behalf of the Supreme Court of Judicature takes the place of the Accountant-General of the Court of Chancery, mentioned in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 76. See Court of Chancery Funds Act, 1872 (35 & 36 Vict. c. 44), ss. 4, 6; Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 3, 31, 34; Supreme Court of Judicature (Funds etc.) Act, 1883 (46 & 47 Vict. c. 29).

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 76. The title of the account will vary in cases otherwise provided for in the Act (*ibid.*; and see, *e.g.*, s. 69).

SECT. 1. **Completion of the Purchase.**

being made the cashier of the Bank is required to give to the promoters, or to the person paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same is received and in respect of what purpose the same is paid in.

Execution of deed poll.

The promoters may then, if they think fit, execute a deed poll, under their common seal if they be a corporation, or if they be not a corporation under the hands and seals of the promoters or any two of them, containing a description of the lands in respect whereof such deposit has been made, and declaring the circumstances under which and the names of the parties to whose credit such deposit has been made, and such deed poll must be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the lands described therein; and thereupon all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase-money or compensation has been deposited will vest absolutely in the promoters, and as against such parties they will be entitled to immediate possession of such lands (*o*).

When owner absent.

144. In cases where the owner is absent from the kingdom or cannot after diligent inquiry be found, or where he has failed to appear on inquiry before a jury, and the promoters have had the compensation assessed by a surveyor in manner provided in the Lands Clauses Acts (*p*), they may proceed in exactly the same way and with the same effect (*q*). If there is a dispute as to the title, but both claimants are known, the amount must be settled either by a jury or by arbitration before the land can be vested in the promoters (*r*).

When procedure applicable.

145. The promoters before adopting the above procedure ought to give the owner an opportunity of making a good title (*s*), but if they have entered into an agreement with any person for the purchase of land, and such person fails to make out a good title, he cannot compel them to adopt this procedure; if they do not, however, they cannot remain in possession under the agreement (*t*). The procedure confers no rights as against third parties, and is not applicable to cases where the person purporting to sell has no title at all to the land (*a*). In order that an estate or interest may vest, the person who fails to make out a good title must have some title, and the failure to make out a title must arise from an independent estate or interest outstanding in a third party; the effect of this procedure is to vest in the promoters the

(*o*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 77.
(*p*) See *ibid.*, s. 58, and p. 95, *ante*.
(*q*) *Ibid.*, ss. 76, 77. For a form of deed poll in such cases, see Encyclopædia of Forms, Vol. VIII., p. 101.
(*r*) *Ex parte London and South Western Rail. Co.* (1869), 38 L. J. (CH.) 527; *Re Manor of Lowestoft and Great Eastern Rail. Co., Ex parte Reeve* (1883), 24 Ch. D 253, C. A.
(*s*) *Doe* d. *Hutchinson* v. *Manchester, Bury and Rossendale Rail. Co.* (1845) 15 L. J. (EX.) 208.
(*t*) *Douglass* v. *London and North Western Rail. Co.* (1857), 3 K. & J. 173.
(*a*) *Wells* v. *Chelmsford Local Board of Health* (1880), 15 Ch. D. 108.

estate and interest of the person so failing, and no more (*b*). Thus, if the person whose interest has been agreed to be acquired proves to have only an inchoate possessory title, the promoters acquire this interest only, and the real owner will not be barred from afterwards asserting his rights (*c*).

SECT. 2.—*Persons under Disability.*

SUB-SECT. 1.—*Payment into Bank.*

Purchase-money over £200.

146. When the lands or any interest therein are purchased or taken from persons under disability who are not entitled to sell or convey the same except under the provisions of the special Act and the Lands Clauses Acts (*d*), the purchase price or compensation payable in respect of such lands or interest, if it amount to or exceed £200, is required to be paid into the Bank of England in the name and with the privity of the Paymaster-General for and on behalf of the Supreme Court of Judicature (*e*), to be placed to his account there, *ex parte* the promoters of the undertaking (describing them by their proper name) and in the matter of the special Act (citing it), pursuant to the method prescribed by any Act for the time being in force for regulating moneys paid into court (*f*).

Compensation payable in respect of any permanent damage to any such lands is also required to be paid into the Bank in the same manner (*f*).

Under £200.

147. If the purchase-money or compensation exceeds £20, but does not amount to £200, payment must either be into the Bank as aforesaid or to two trustees to be nominated by the parties entitled to the rents or profits in respect whereof the same shall be payable, such nomination to be signified by writing under the hands of the party so entitled (*g*). In case of the coverture, infancy, lunacy, or other incapacity of the parties entitled to such moneys, such nomination may be made by their respective husbands, guardians, committees, or trustees; but such last-mentioned application of the moneys cannot be made unless the promoters approve thereof and of the trustees named for the purpose (*g*).

(*b*) *Douglass* v. *London and North Western Rail. Co.* (1857), 3 K. & J. 173.

(*c*) *Ex parte Winder* (1877), 6 Ch. D. 696; *Gedye* v. *Commissioners of Works and Public Buildings*, [1891] 2 Ch. 630, C. A.; *Wells* v. *Chelmsford Local Board of Health* (1880), 15 Ch. D. 108.

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 7, and p. 57, *ante*; and as to the classes of persons referred to, see *Kelland* v. *Fulford* (1877), 6 Ch. D. 494; *Newton* v. *Metropolitan Rail. Co.* (1861), 8 Jur. (N. S.) 738; *Re Chelsea Waterworks Co.* (1887), 56 L. T. 421.

(*e*) The Paymaster-General is now substituted for the Accountant-General of the Court of Chancery. See note (*m*) on p. 107, *ante*.

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 69. Payment into court is now regulated by the Supreme Courts Funds Rules, 1905, made pursuant to the Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44); the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77); the Supreme Court of Judicature (Funds etc.) Act, 1883 (46 & 47 Vict. c. 29); the Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16).

(*g*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 71. Variations in

SECT. 2. Persons under Disability. Under £20.

148. If the purchase-money or compensation does not exceed £20, it is to be paid to the parties entitled to the rents and profits of the lands in respect whereof the same shall be payable for their own use and benefit; or in case of coverture, infancy, idiocy, or lunacy or other incapacity of any such parties, the money should be paid, for their separate use, to the respective husbands, guardians, committees, or trustees of such persons (*h*).

Where owner has special power of sale.

149. Persons under disability who are empowered to sell by the Lands Clauses Acts may also have powers of sale under deeds of settlement or wills, or under other statutes, as, for example, in the case of tenants for life under the Settled Land Acts (*i*). Sales by such persons will be regulated by the statute or deed under which the sale is purported to be made, but the promoters cannot, in order to save themselves expense, insist on the sale being carried out under any power other than that contained in the Lands Clauses Acts (*k*).

Payment into Bank.

150. The promoters, if necessary, will be compelled by mandamus to pay the money into the Bank of England (*l*), but as the requirement of such payment is for the safe custody of the money and is not necessary in order to perfect the title of the promoters, the court may sanction the application of the money to some proper purpose without such payment in (*m*). If the promoters have been compelled, in order to obtain possession, to pay the money to the sheriff on behalf of a person under disability, such person will be required to pay it into court (*n*).

Sale by limited owner.

151. When a person who is not entitled absolutely for his own benefit to dispose of lands or of the particular interest agreed to be sold agrees or contracts with the promoters that a certain sum shall be paid to him absolutely for his own benefit in respect of the taking, using, or interfering with any lands, such sum, if it exceeds £20, must be paid into the Bank of England or to trustees in manner aforesaid, either by the promoters or by the person

these amounts are made in other Acts, *e.g.*, the Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 14.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 72. When sums under £20 are left in court after investment, the court may order such sums to be paid to the person entitled to the rents and profits for his own use (*Re Egremont (Lord)* (1848), 12 Jur. 618; *Re London and Birmingham Rail. Co. Act, Ex parte Loughton (Rector)* (1849), 5 Ry. & Can. Cas. 591; *Re Hichin's Estate* (1853), 1 W. R. 505; *Re Bateman's Estate* (1852), 21 L. J. (CH.) 691; *Ex parte Sheffield (Vicar)* (1904), 68 J. P. 313).

(*i*) See title REAL PROPERTY AND CHATTELS REAL.

(*k*) *Re Piggott and Great Western Rail. Co.* (1881), 18 Ch. D. 146; *Re Bentinck (Lady) and London and North Western Rail. Co.* (1895), 12 T. L. R. 100; *Re Leeds Grammar School*, [1901] 1 Ch. 228.

(*l*) *Barnett* v. *Great Eastern Rail. Co.* (1868), 18 L. T. 408; *Williams* v. *Llanelly Rail. Co.* (1868), 19 L. T. 310.

(*m*) *Re London, Brighton, and South Coast Rail. Co., Ex parte Abergavenny (Earl)* (1856), 4 W. R. 315; *Re Milnes* (a person of unsound mind) (1875), 1 Ch. D. 28.

(*n*) *London and North Western Rail Co.* v. *Lancaster Corporation* (1851), 15 Beav. 22.

receiving it (*o*). It is unlawful for any contracting party not entitled as aforesaid to retain for his own use any sums so agreed or contracted to be paid for or in respect of the taking, using, or interfering with any such lands, or in lieu of bridges, tunnels, or other accommodation works, or for assenting to or not opposing the passing of the Bill authorising the taking of such lands, but all such moneys are deemed to have been contracted to be paid for and on account of the several parties interested in such lands, as well in possession as in remainder, reversion, or expectancy; but the court or the trustees, as the case may be, may allot to such person a portion of the sum, so paid into the Bank or to the trustees, for his own use as compensation for injury, inconvenience, or annoyance caused to him, independently of the value of the land taken and the damage to other land held therewith (*p*).

SUB-SECT 2.—*Conveyance.*

Failure of owner to convey.

152. When the money has been deposited in the Bank in respect of lands purchased or taken by the promoters, the owner of the lands, including in such term all parties enabled to sell and convey under the Lands Clauses Acts, when required so to do by the promoters must duly convey such lands to them or as they shall direct (*q*). In default thereof, or if he fails to make a good title to such lands to their satisfaction, the promoters may, if they think fit, execute a deed poll under their common seal if they be a corporation, or if they be not a corporation under the hands and seals of the promoters or any two of them, containing a description of the lands in respect of which such default has been made, and reciting the purchase or taking thereof by the promoters and the names of the parties from whom the same were purchased or taken and the deposit made in respect thereof, and declaring the fact of such default having been made, and such deed poll must be stamped with the stamp duty payable upon a conveyance to the promoters of the lands described therein; and thereupon all the estate and interest in such lands of, or capable of being sold and conveyed by, the party between whom and the promoters such agreement has been come to, or as between whom and the promoters such purchase-money or compensation has been determined by a jury, or by arbitrators, or by a surveyor appointed by two justices as provided in the Lands Clauses Acts (*r*), and has been deposited as aforesaid, will vest absolutely in the promoters; and as against such parties and all parties on behalf

(*o*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 73; *Pole* v. *Pole* (1865), 2 Drew. & Sm. 420; *Taylor* v. *Chichester and Midhurst Rail. Co.* (1870), L. R. 4 H. L. 628.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 73; and see p. 117, *post*, as to the application of money in court.

(*q*) Certain forms of conveyance are provided by the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80, Scheds. A and B, but these are now rarely used in practice. As to the implied grant of ways of necessity and apparent easements on such a conveyance, see *Serff* v. *Acton Local Board* (1886), 31 Ch. D. 679.

(*r*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 21—68, and pp. 76 *et seq.*, *ante*.

SECT. 2. Persons under Disability.

of whom they are enabled to sell and convey, the promoters will be entitled to immediate possession of the lands (*s*).

After payment into the Bank the promoters must also execute a conveyance if the title is satisfactory (*t*).

SECT. 3.—*Costs of Conveyance.*

SUB-SECT. 1.—*Costs payable by Promoters.*

Costs payable by promoters.

153. The costs of all conveyances of lands purchased under the special Act and the Lands Clauses Acts incorporated therein are borne by the promoters, whether the sale is voluntary or under compulsion (*a*). Such costs include all charges and expenses, incurred on the part of the seller as well as of the purchasers, of all conveyances and assurances of the lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms or interests, and of making out and furnishing such abstracts and attested copies as the promoters may require, and all other reasonable expenses incident to the investigation, deduction, and verification of the title (*b*).

If, in order formally to complete a title otherwise good, letters of administration are required by the promoters to be taken out, or some act is required by them to be done which would not otherwise have been necessary, they must pay the costs thereby occasioned (*c*). Promoters are also required to pay the stewards' fees and other costs on admission of a customary heir to copyhold land if the

(*s*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 75; and compare ss. 76, 77, and p. 108, *ante*, for a similar procedure when the owner refuses to convey or cannot be found.

(*t*) *Re Cary Elwes' Contract*, [1906] 2 Ch. 143. For various forms of conveyances to the promoters, see Encyclopædia of Forms, Vol. VIII., pp. 90 *et seq.*

(*a*) *Re Burdekin*, [1895] 2 Ch. 136, C. A.

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 82. For examples under other Acts, see *Re London and Greenwich Rail. Co., Ex parte Addey's Charity* (1843), 12 L. J. (CH.) 513; *Re Strachan's Estate and Metropolitan Improvement Acts* (1851), 9 Hare, 185. The provision may be varied by agreement (*Re London and South Western Rail. Co., Ex parte Phillips* (1862), 32 L. J. (CH.) 102); and see *Re County of Middlesex Light Railways Order*, 1903, [1908] W. N. 167.

(*c*) *Re Liverpool Improvement Act* (1868), L. R. 5 Eq. 282, overruling *Re South Wales Rail. Co.* (1851), 14 Beav. 418; *Re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900, [1908] 1 Ch. 493. Decisions to the like effect have been given in Ireland. See *Re Dublin (South) City Market Co., Ex parte, Keatley* (1890), 25 L. R. Ir. 265; *Re Bear Island Defence Works and Doyle*, [1903] 1 I. R. 164 (appeal). Costs of taking out probate to the estate of a deceased person who had agreed to sell a leasehold interest have been held not to be payable by the promoters (*Re Elementary Education Acts*, 1870 and 1873, [1909] 1 Ch. 55, C. A.). If the promoters pay the money into court by reason of the owner's failure to make a good title, they will be required to pay similar costs on application to the court for payment out of the money (*Re Lloyd and North London Railway (City Branch) Act*, 1861, [1896] 2 Ch. 397, and Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80, and p. 126, *post*). Irish cases on the same point are *Re Dublin Junction Railways, Ex parte Kelly* (1893), 31 L. R. Ir. 137; *Re Midland and Great Western Rail. Co., Ex parte Rorke*, [1894] 1 I. R. 146; *Re Kearnes, Ex parte Lurgan Urban District Council*, [1902] 1 I. R. 157. In that last case and in *Re Bear Island Defence Works and Doyle, supra*, the promoters were also required to pay death duties in respect of the land. As to costs of registering title, see *Re Belfast and Northern Counties Rail. Co., Ex parte Gilmore*, [1895] 1 I. R. 297.

SECT. 3. Costs of Conveyance.

vendor dies before completion (*d*). The costs of an application to the court to appoint a person to convey, when that is necessary, are also payable by the promoters (*e*), as are the costs of the conveyancing counsel when required (*f*). The costs of the conveyance do not include costs of preliminary negotiations, nor the costs of apportioning ground rents when part of leasehold property is taken (*g*), nor do they include costs of collateral agreements (*h*).

Scale costs.

The scale of costs provided by the general order under the Solicitors' Remuneration Act, 1881 (*i*), does not apply to the vendor's costs in respect of these conveyances (*k*), but it applies to the costs of the solicitor for the purchasers (*l*).

SUB-SECT. 2.—*Taxation and Recovery of Costs.*

Taxation of costs.

154. When the promoters and the party entitled to costs cannot agree as to the amount, the costs are required to be taxed by one of the taxing masters of the Supreme Court upon an order of that court (*m*), to be obtained upon petition in a summary way by either of the parties (*n*), but such order cannot be obtained by the promoters after the costs have been paid (*o*).

The expense of taxation is borne by the promoters, unless upon such taxation one sixth part of the amount of the costs is disallowed, in which case the costs of the taxation are borne by the party whose costs are so taxed, and the amount thereof must be ascertained by the master and deducted by him accordingly in his certificate of taxation (*p*).

Recovery of costs.

The promoters are required to pay the sum certified by the master to be due in respect of such costs to the party entitled thereto, and in default the same may be recovered in the same way as any other costs payable under an order of the Supreme

(*d*) *Re London United Tramways Act*, 1900, [1906] 1 Ch. 534 ; *Re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900, [1908] 1 Ch. 493, C. A. In the latter case it was also held that the lord's fine on admission was not payable, overruling on this point the case first cited in this note.

(*e*) *Re Lowry's Will* (1872), L. R. 15 Eq. 78 ; *Re Nash's Estate* (1855), 4 W. R. 111 ; *Re Eastern Counties and Tilbury Junction Rail. Co., Ex parte Cave* (1855), 26 L. T. (o. s.) 176. Promoters, however, will not be obliged to pay costs incurred in respect of such part of the application as fails ; see *In re Jacobs, Baldwin* v. *Pescott*, [1908] 2 Ch. 696.

(*f*) *Re Spooner's Estate* (1854), 1 K. & J. 220.

(*g*) *Re Hampstead Junction Rail. Co., Ex parte Buck* (1863), 1 Hem. & M. 519 ; see p. 148, *post*.

(*h*) Such as an agreement to carry the vendor's coals at a fixed price (*Re Leitch and Kewney, Solicitors* (1867), 15 W. R. 1055).

(*i*) 44 & 45 Vict. c. 44.

(*k*) Part I., Sched. I., r. 11, of the General Order ; and *Re Burdekin*, [1895] 2 Ch. 136, C. A.

(*l*) *Re Stewart* (1889), 41 Ch. D. 494 ; *Re Merchant Taylors' Co.* (1885), 30 Ch. D. 28, C. A.

(*m*) There is now only one taxing department in the High Court. See *Covington* v. *Metropolitan District Rail. Co.*, [1903] 1 K. B. 231.

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 83. See titles PRACTICE AND PROCEDURE ; SOLICITORS.

(*o*) *Re South Eastern Rail. Co., Ex parte Somerville* (1883), 23 Ch. D. 167. Costs agreed to be paid on the abandonment of an inquisition are not taxable under this section (*Drogheda (Marquis)* v. *Great Southern and Western Rail. Co.* (1847), 12 I. Eq. R. 103).

(*p*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 83

SECT. 3. Costs of Conveyance.

Court, or they may be recovered by distress, and on application to any justice he is required to issue his warrant accordingly (*q*). The master's taxation of these costs would appear to be open to review by the court (*r*).

Part XI.—Application of Money deposited in Bank.

SECT. 1.—*Deposit in case of Refusal to convey or make Title or of the Owner being absent.*

SUB-SECT. 1.—*Application to the Court.*

Dealing with deposited money.

155. When the purchase-money or compensation has been deposited in the Bank of England by the promoters because the owner has either refused to accept the same, or has neglected or failed to make out a title to the lands, or because he has refused to convey or release the lands as directed by the promoters, or because the owner is absent from the kingdom or cannot after diligent inquiry be found, or because he failed to appear before the jury at the appointed time to have the amount assessed, any party making claim to the money or any part thereof, or to the lands in respect whereof the same has been deposited or any part of such lands or any interest therein, may apply to the Chancery Division of the High Court for an order for the investment of the money and for payment of the dividends or for the distribution or other application of the money (*s*). Thus, a legal or equitable mortgagee may apply for payment out to him of the amount due on his mortgage and of arrears of interest up to six years (*a*). Persons may also apply who are entitled in respect of trade claims or loss of profits (*b*), or who have established their title by other proceedings (*c*). If the promoters pay off any of these interests, they may themselves apply for payment out (*d*).

(*q*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 53, 83.

(*r*) Compare *Owen* v. *London and North Western Rail. Co.* (1867), L. R. 3 Q. B. 54, *per* COCKBURN, C.J., at p. 60, *per* SHEE, J., at p. 61; *Sandbach Charity Trustees* v. *North Staffordshire Rail. Co.* (1877), 3 Q. B. D. *per* BRETT, J., at p. 5, C. A.; and see p. 85, *ante*.

(*s*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 78. The application to the court should be by summons in the cases mentioned in R. S. C., Ord. 55, r. 2 (1), (2), and (7), and in other cases by petition (*Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541; *A.-G.* v. *St. John's Hospital, Bath*, [1893] 3 Ch. 151; and see title PRACTICE AND PROCEDURE). The court must act although only one of several persons named in the account applies (see *Re Brandon, Brandon* v. *Brandon* (1864), 34 L. J. (CH.) 333).

(*a*) *Re Marriage, Ex parte London, Tilbury and Southend Rail. Co. and Eastern Counties and London and Blackwall Rail. Co.* (1861), 9 W. R. 843, C. A.; *Re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713; *Pile* v. *Pile, Ex parte Lambton* (1876), 3 Ch. D. 36, C. A.

(*b*) *Cooper* v. *Metropolitan Board of Works* (1883), 25 Ch. D. 472, C. A.

(*c*) *Galliers* v. *Metropolitan Rail. Co.* (1871), L. R. 11 Eq. 410.

(*d*) *Re Marriage* (1861), 9 W. R. 843, C. A.; *Cooper* v. *Metropolitan Board of Works* (1883), 25 Ch. D. 472, at p. 480, C. A.

SUB-SECT. 2.—*Powers of the Court.*

SECT. 1.
Deposit in case of Refusal to convey etc.

Powers of the court.

156. The court may, on application in a summary way, order the money to be laid out or invested in any of the stocks, funds, or securities in which money under the control of the court may be invested (*e*), or may order distribution thereof or payment of the dividends thereon according to the respective estates, titles, or interest of the parties making claim to such money or lands or any part thereof, and may make such other order in the premises as to such court shall seem fit (*f*).

The court uses its own machinery to determine the interest of the party applying, and also to apportion the amount due to him (*g*). Thus, if the money paid in represents the value of more land or of a greater interest in land than that to which the claimant can make title, the court will order an inquiry as to the extent of the claimant's interest, and will order an amount equivalent thereto to be paid to him, and the balance may be either retained in court or paid out to the promoters (*h*).

If various persons having interests in the land apply, such as a dowress and an infant owner (*i*), a mortgagor and mortgagee (*k*), or the heir and the personal representatives (*l*), the court will also determine their respective rights. When there are rival claims in respect of the money in court, the rival claimant may be brought before the court by permission being granted to the applicant to serve such person, except in the case of the Crown, which cannot be so brought before the court (*m*), but the matter in dispute may be settled by other proceedings (*n*), and the court may direct the application to stand over until it is so settled (*o*).

SUB-SECT. 3.—*Persons in Possession.*

Questions as to title of parties.

157. When questions arise as to the title to the lands in respect of which the money has been deposited in the Bank, the parties

(*e*) *Re Metropolitan and District Railways Act, Ex parte St. John Baptist College, Oxford* (1882), 22 Ch. D. 93, C. A.; and as to these securities, see R. S. C., Ord. 22, r. 17.

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 78.

(*g*) *Brandon* v. *Brandon* (1864), 2 Drew. & Sm. 305.

(*h*) *Re Alston's Estate* (1856), 5 W. R. 189, a case in which it was admitted that a small part of the land originally claimed, and in respect of which the money was paid in, did not belong to the claimant (*Re Perk's Estate* (1853), 1 Sm. & G. 545; *Re North London Rail. Co., Ex parte Cooper* (1865), 34 L. J. (CH.) 373; *Re Hayne's Estate* (1865), 13 W. R. 492).

(*i*) *Re Hall's Estate* (1870), L. R. 9 Eq. 179.

(*k*) *Re Marriage, Ex parte London, Tilbury, and Southend Rail. Co.* (1861), 9 W. R. 843, C. A.; *Re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713.

(*l*) *Re East Lincolnshire Rail. Act, Ex parte Flamank* (1851), 1 Sim. (N. S.) 260.

(*m*) *Re Manor of Lowestoft and Great Eastern Rail. Co., Ex parte Reeve* (1883), 24 Ch. D. 253, at p. 256, C. A.

(*n*) *Bogg* v. *Midland Rail. Co.* (1867), L. R. 4 Eq. 310; *Cooper* v. *Metropolitan Board of Works* (1883), 25 Ch. D. 472, C. A.; *Pile* v. *Pile, Ex parte Lambton* (1876) 3 Ch. D. 36, C. A.; *Galliers* v. *Metropolitan Rail. Co.* (1871), L. R. 11 Eq. 410; *Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1888), 40 Ch. D. 268, C. A.

(*o*) *Re Manor of Lowestoft and Great Eastern Rail. Co., Ex parte Reeve, supra;* and see *Re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173; *Ex parte Freemen and Stallingers of Sunderland* (1852), 1 Drew. 184.

SECT. 1. Deposit in case of Refusal to convey etc.

respectively in possession of the lands as being the owners thereof, or in receipt of the rents of such lands as entitled thereto at the time of such lands being purchased or taken, are deemed to have been lawfully entitled to such lands until the contrary is shown to the satisfaction of the court; and, unless the contrary is shown, the parties so in possession, and all parties claiming under them or consistently with their possession, are deemed entitled to the money so deposited and to the dividends or interest of the annuities or securities purchased therewith, and the same must be paid and applied accordingly (*p*). Thus, persons who have merely possessory titles (*q*), or titles which would have ripened into possessory titles but for the action of the promoters (*r*), are entitled to the deposited money or to the dividends thereon. Similarly, where part of an owner's land is taken, the court, on being satisfied that he has a title which can be supported, will order the money or the dividends to be paid to him without further proof thereof or argument thereon, because his title to the remainder ought not to be jeopardised (*s*). Persons in possession of closed burial grounds are likewise entitled to the fund in court (*t*).

Lessees.

A person who has gone into possession for a lesser interest than the fee, such as a lessee, cannot claim the whole of the money deposited as the value of the land although the reversioner is unknown, as he is not in possession as owner of the fee, but is only entitled to so much as represents the value of the interest in respect of which he is in possession (*a*).

SECT. 2.—*Persons under Disability.*

SUB-SECT. 1.—*Application to the Court.*

Persons under disability.

158. When money is paid into the Bank of England by reason of the owner being a person under disability and not entitled to sell and convey except under the provisions of the special Act and the Lands Clauses Act, such money remains in the Bank under the control of the Chancery Division of the High Court until it is applied to certain authorised purposes (*b*).

It may be applied, paid out, or temporarily invested upon an order of the Chancery Division, made at the instance of the party who would have been entitled to the rents and profits of the lands

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 79.

(*q*) *Re Cook's Estate* (1863), 8 L. T. 759; *Re Alston's Estate* (1856), 5 W. R. 189; *Ex parte Webster*, [1866] W. N. 246. Compare *Perry* v. *Clissold*, [1907] A. C. 73.

(*r*) *Re Jane Evans* (1873), 42 L. J. (CH.) 357; *Ex parte Winder* (1877), 6 Ch. D. 696; and compare *Ex parte Hollinsworth* (1871), 19 W. R. 580.

(*s*) *Re Sterry* (1855), 3 W. R. 561; *Re St. Pancras Burial Ground* (1863), L. R. 3 Eq. 173; and see *Ex parte Freemen and Stallingers of Sunderland* (1852), 1 Drew. at p. 189.

(*t*) *Re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173; and see *Campbell* v. *Liverpool Corporation* (1870), L. R. 9 Eq. 579.

(*a*) *Gedye* v. *Commissioners of Works*, [1891] 2 Ch. 630, C. A.; *Re Harris, Ex parte London County Council*, [1901] 1 Ch. 931. The correctness of *Re Metropolitan Street Improvement Act*, 1877, *Ex parte Chamberlain* (1880), 14 Ch. D. 323, was doubted in the case first cited in this note.

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 69—74.

SECT. 2. Persons under Disability.

in respect of which the money has been deposited (*c*). Thus consecutive tenants for life may apply (*d*), but a remainderman (*e*) or an annuitant (*f*) cannot do so. In the case of disused burial grounds, the party entitled to the burial fees, if any, would be the proper person to apply to the court (*g*).

Procedure.

The application to the court is made by summons in those cases mentioned in the Rules of the Supreme Court (*h*), unless by reason of the difficulty of the case or otherwise it is cheaper or better to proceed by petition (*i*). In cases not provided for by the rules, the procedure is by petition (*k*). If there is more than one sum of money in court in respect of two or more pieces of land to which one person would have been entitled to the rents and profits, the application or investment of all the sums may be dealt with on one summons or petition (*l*).

SUB-SECT. 2.—*Sum for Personal Inconvenience or Loss.*

Rights of limited owners.

159. The court in its discretion may allot to any tenant for life or for any other partial or qualified estate, for his own use, a portion of the sum paid into the Bank, as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands taken and of the damage occasioned to the lands held therewith, by reason of the taking of such lands and the making of the works (*m*). A tenant

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 70.

(*d*) *Re Jolliffe's Estate* (1870), L. R. 9 Eq. 668.

(*e*) *Nash* v. *Nash* (1868), 37 L. J. (CH.) 927.

(*f*) *Re St. Katherine Dock Co., Ex parte Back* (1828), 2 Y. & J. 386; and see *Ex parte Cofield* (1847), 11 Jur. 1071; *Re London and Tilbury Rail. Co., Re Pedley's Estate* (1855), 1 Jur. (N. S.) 654; *Re London, Brighton and South Coast Rail. Co., Ex parte Wilkinson* (1849), 3 De G. & Sm. 633.

(*g*) Such as the rector (*Ex parte Liverpool (Rector)* (1870), L. R. 11 Eq. 15; *Ex parte St. Martin's, Birmingham (Rector)* (1870), L. R. 11 Eq. 23), or the trustees of the ground (*Re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173; and compare *Champneys* v. *Arrowsmith* (1867), L. R. 3 C. P. 107, Ex. Ch.).

(*h*) Ord. 55, r. 2. The provision in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 70, as to procedure by petition, is repealed by this rule (*Ex parte London Corporation* (1883), 25 Ch. D. 384. See title PRACTICE AND PROCEDURE).

(*i*) *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541; *Re Broadwood* (1886), 55 L. J. (CH.) 646; *Re De Grey's (Earl) Settled Estate*, [1887] W. N. 241; *Re St. Alban's, Wood Street (Rector)* (1892), 66 L. T. 51.

(*k*) *Re Hargreave's Trust, Ex parte Bradford Corporation* (1888), 58 L. T. 367; *Ex parte Jesus College, Cambridge* (1884), 50 L. T. 583; *Re Sanders* (1894), 70 L. T. 755.

(*l*) *Re Manchester, Sheffield and Lincolnshire Rail. Co., Ex parte Sheffield Corporation* (1855), 21 Beav. 162; *Re Arden (Lord)* (1875), 10 Ch. App. 445; *Re Browse's Trusts* (1866), 14 L. T. 37, C. A.; *Re Southampton and Dorchester Rail. Co., Ex parte King's College, Cambridge* (1852), 5 De G. & Sm. 621; *Re Gore Langton's Estates* (1875), 10 Ch. App. 328. The practice is to divide the brokerage charges equally although the amounts are unequal (*Ex parte Emmanuel Hospital* (1908), 24 T. L. R. 261).

(*m*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 73; *Taylor* v. *Chichester and Midhurst Rail. Co.* (1870), L. R. 4 H. L. 628, at p. 643. Thus, a sum may be allowed to a rector for annoyance caused to him by the construction of a railway in what was part of his glebe (*Re East Lincolnshire Rail. Co., Ex parte Little Steeping (Rector)* (1848), 5 Ry. & Can. Cas. 207; *Re Saunderton Glebe Lands, Ex parte Saunderton (Rector)*, [1903] 1 Ch. 480; *Re Collis's Estate* (1866), 14 L. T.

SECT. 2. Persons under Disability.

for life is not allowed any capital sum for matters in respect of which he is entitled to the income of the money in court, and such income may be deemed sufficient compensation. Thus, he will not be entitled to any sum as representing the fees and fine on enfranchisement of copyhold lands (*n*), and he may not be entitled to any capital sum in respect of minerals which might be worked out in his lifetime (*o*).

Costs of tenant for life.

A tenant for life or for a less estate may be allowed out of the money in the Bank a sum to cover the costs he may have properly incurred in connection with the purchase or taking of the land, such as the costs of preliminary negotiation (*p*), of an arbitration as to the price of the land when the award has been less than the amount offered (*q*), and other similar matters (*r*).

Costs of opposing Bill.

Costs incurred by such a tenant in opposing the special Act while passing as a Bill through Parliament are not payable out of the fund in court under the Lands Clauses Acts (*s*), but the court can authorise the payment of such costs out of the money in court either under its general jurisdiction (*a*) or under the Settled Land Act, 1882 (*b*).

When the money paid for the land has been paid to trustees instead of into the Bank by reason of its being under £200, the trustees may allot to such tenant a sum for injury, inconvenience, or annoyance in the same way as the court (*c*).

SUB-SECT. 3.—*Interim Investment and Payment of Dividends.*

Interim investment of moneys.

160. Until the money is permanently applied the Chancery Division may order that it be invested by the Paymaster-General in any of the stocks, funds, or securities in which cash under the control of the court may be invested (*d*).

The court may likewise order that the interest, dividends, and annual proceeds of these investments be paid to the party who

352) ; or to a tenant for life for money laid out on a road for which the promoters agreed to pay (*Re Marlborough's (Duke) Estates* (1849), 13 Jur. 738).

(*n*) *Re Wilson's (Sir T. M.) Estates* (1863), 32 L. J. (CH.) 191.

(*o*) *Re Robinson's Settlement Trusts*, [1891] 3 Ch. 129 ; but see *Cardigan* v. *Curzon Howe* (1898), 14 T. L. R. 550.

(*p*) *Re Strathmore Estates* (1874), L. R. 18 Eq. 339 ; *Re Oldham's Estate*, [1871] W. N. 190.

(*q*) *Re Berkeley's (Earl) Will* (1874), 10 Ch. App. 56 ; *Re Aubrey's Estate* (1853), 17 Jur. 874 ; *Ex parte Whitworth (Curate)* (1871), 24 L. T. 126.

(*r*) *Re Glebe Lands of Great Yeldham* (1869), L. R. 9 Eq. 68 ; *Blackford* v. *Davis* (1869), 4 Ch. App. 304 ; *Rees* v. *Metropolitan Board of Works* (1880), 14 Ch. D. 372.

(*s*) *Re Berkeley's (Earl) Will, supra ; Re Nicholl's Estate*, [1878] W. N. 154.

(*a*) *Re Ormrod's Settled Estates*, [1892] 2 Ch. 318 ; *Re London County Council, Ex parte Pennington* (1901), 84 L. T. 808 ; and compare *A.-G.* v. *Brecon Corporation* (1878), 10 Ch. D. 204.

(*b*) 45 & 46 Vict. c. 38, s. 36.

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 73.

(*d*) *Ibid.*, s. 70 ; *Re Metropolitan and District Railways Act, Ex parte St. John Baptist College, Oxford* (1882), 22 Ch. D. 93, C. A. ; *Re Brown* (1890), 59 L. J. (CH.) 530, C. A. For the list of funds, stocks, and securities in which the money may be invested, see R. S. C., Ord. 22, r. 17. The official broker is employed ; as to costs of brokerage, see *Re Gaselee*, [1901] 1 Ch. 923.

would for the time being be entitled to the rents and profits (*e*). Thus, they may be ordered to be paid to the person who was tenant for life of the lands taken, although the conveyance has not been executed, provided the promoters have taken possession (*f*). They may be ordered to be paid to trustees, whether private (*g*) or charitable (*h*), and to persons entitled to the fees, if any, of disused burial grounds (*i*). Where there are successive interests the order may direct that the dividends be paid to the person entitled for the time being, as in the case of rectors and vicars (*k*), or to a man for his life and then to his wife (*l*). If the order is not made in this form, a fresh order may be necessary (*m*). The dividends unpaid at the date of the death of any person entitled to the rents and profits will be apportioned and paid to the personal representatives of the deceased (*n*).

Payment of income.

SUB-SECT. 4.—*Permanent Application of Money.*

161. The money in the Bank may be permanently applied in the purchase or redemption of the land tax (*o*), or in the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid or affecting other lands settled therewith to the same or like uses, trusts, or purposes (*p*). Thus, a corporation may be allowed to apply the money to pay off mortgages on other corporate land or tolls, or to pay off bonds the interest of which was payable out of the common fund, which was mainly made up of the rents and profits of land (*q*). An order may be made sanctioning

Objects for application of money.

(*e*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 70.

(*f*) *Re Wrey's Settlement* (1865), 13 W. R. 543; *Ex parte Cofield* (1847), 11 Jur. 1071; *Re John Hungerford* (1855), 1 K. & J. 413.

(*g*) *Re Clinton* (1860), 6 Jur. (N. S.) 601; *Re Coulson's Settlement*, [1867] W. N. 233; *Re Pryor's Settlement*, [1876] W. N. 141; *Re Foy's Trusts* (1875), 23 W. R. 744; *Re Metropolitan Rail. Co. and Maire*, [1876] W. N. 245; *Re Goe's Estate* (1854), 3 W. R. 119.

(*h*) *Re Collin's Charity and London and Birmingham Railway Act* (1851), 20 L. J. (CH.) 168; *Re Codrington's Charity* (1874), L. R. 18 Eq. 658; *Re Davenant's Charity* (1854), 2 W. R. 344.

(*i*) *Ex parte Liverpool (Rector)* (1870), L. R. 11 Eq. 15; *Ex parte St. Martin's, Birmingham (Rector)* (1870), L. R. 11 Eq. 23; *Re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173.

(*k*) *Re Pearce* (1857), 24 Beav. 491; *Re St. Benet's (Rector etc.)* (1865), 12 L. T. 762; *A.-G.* v. *Brandreth* (1842), 1 Y. & C. Ch. Cas. 200; *Re the East Lincolnshire Rail. Co.'s Acts, Ex parte Canterbury (Archbishop)* (1848), 5 Ry. & Can. Cas. 699.

(*l*) *Re How's Trust* (1850), 15 Jur. 266; *Re Lowndes' Trust* (1851), 20 L. J. (CH.) 422; *Re Brent's Trust* (1860), 8 W. R. 270.

(*m*) *Re Jolliffe's Estate* (1870), L. R. 9 Eq. 668; and see *Chapman* v. *Chapman* (1874), L. R. 17 Eq. 350.

(*n*) Supreme Court Funds Rules, 1905, r. 62.

(*o*) See, for example, *Re Lee and Hemingway* (1883), 24 Ch. D. 669; *Re London and Birmingham Rail. Co., Ex parte Northwick* (1834), 1 Y. & C. (EX.) 166; *Re Queen Camel (Vicar)* (1863), 8 L. T. 233.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 69.

(*q*) *Re Derby Municipal Estates* (1876), 3 Ch. D. 289; *Re Eastern Counties Rail. Co., Ex parte Cambridge Corporation* (1848), 5 Ry. & Can. Cas. 204; and see *Ex parte Hythe Corporation* (1840), 4 Y. & C. (EX.) 55; *Re Dublin, Wicklow and Wexford Rail. Co., Ex parte Tottenham* (1884), 13 L. R. Ir. 479; *Re Dublin, Wicklow and Wexford Rail. Co., Ex parte Richards* (1890), 25 L. R. Ir. 175.

SECT. 2. **Persons under Disability.**

Discharging incumbrances.

the application of the money to purchasing the surrender of beneficial leaseholds (*r*), in redeeming quit rents and rent-charges (*s*), in paying off rent to prevent re-entry on leasehold premises (*t*), in re-instating structures to prevent a sale under a Building Act (*a*), and in paying off expenses under Inclosure Acts (*b*). It may not, however, be applied in paying off charges payable by the person in possession, and not charged on the inheritance, such as expenses for the restoration of a chancel, or in paying off money borrowed from the Governors of Queen Anne's Bounty (*c*).

Purchase of land.

162. It may also be permanently applied in the purchase of other lands to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner, as the lands in respect of which such money has been paid stood settled (*d*) or limited (*e*). Thus, the purchase-money for copyhold lands may be laid out in the purchase of copyhold lands (*f*), and that for freehold lands in enfranchising copyhold lands (*g*), but in the absence of special circumstances the purchase-money for freehold lands will not be allowed to be laid out in the purchase of copyholds (*h*), leaseholds (*i*), or equities of redemption (*k*). The erection of permanent

(*r*) *Re Manchester, Sheffield and Lincolnshire Rail. Co., Ex parte Sheffield Corporation* (1855), 25 L. J. (CH.) 587; *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14, C. A.; *Ex parte London Corporation* (1868), L. R. 5 Eq. 418; *Re Townshend's (Marquis) Estates*, [1882] W. N. 7.

(*s*) *Re Commissioners of Public Works, Ex parte Studdert* (1856), 6 I. Ch. R. 53; *Re Commissioners of Church Temporalities, Ireland, Ex parte Leconfield (Lord)* (1874), I. R. 8 Eq. 559; *Re Dublin, Wicklow and Wexford Rail. Co., Ex parte Tottenham* (1884), 13 L. R. Ir. 479.

(*t*) *Re London Street, Greenwich* (1887), 57 L. T. 673.

(*a*) *Re Davis and Crystal Palace and West End Railway Act, Ex parte Davis* (1858), 3 De G. & J. 144, C. A.

(*b*) *Re Oxford, Worcester etc. Rail. Co., Ex parte Lockwood* (1851), 14 Beav. 158; *Ex parte Queens' College, Cambridge* (1849), 14 Beav. 159, n.; *Vernon* v. *Manvers (Earl)* (1862), 11 W. R. 133.

(*c*) *Re Louth and East Coast Rail. Co., Ex parte Grimoldby (Rector)* (1876), 2 Ch. D. 225; *Re Hull Railway and Dock Act, Ex parte Kirksmeaton (Rector)* (1882), 20 Ch. D. 203; *Re Commissioners of Public Works, Ex parte Studdert, supra;* and compare *Ex parte London County Council, Ex parte Christ Church, East Greenwich (Vicar)*, [1896] 1 Ch. 520.

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 69.

(*e*) *Kelland* v. *Fulford* (1877), 6 Ch. D. 491, *per* JESSEL, M.R., at p. 494; and see *Ex parte Castle Bytham (Vicar) and Ex parte Midland Rail. Co.*, [1895] 1 Ch. 348.

(*f*) *Re Eastern Counties Rail. Co., Ex parte Sawston (Vicar)* (1858), 27 L. J. (CH.) 755; *Re Browne and Oxford and Bletchley Junction and Buckinghamshire Railway Acts* (1852), 6 Ry. & Can. Cas. 733, C. A.

(*g*) *Re Cheshunt College* (1855), 3 W. R. 638; *Dixon* v. *Jackson* (1856), 25 L. J. (CH.) 588.

(*h*) *Re Cann's Estate* (1849), 19 L. J. (CH.) 376.

(*i*) *Re Lancashire and Yorkshire Rail. Co., Ex parte Macauley* (1854), 23 L. J. (CH.) 815, C. A.; *Ex parte Trinity College, Cambridge* (1868), 18 L. T. 849; *Re Rehoboth Chapel* (1874), 44 L. J. (CH.) 375. The purchase-money for leaseholds may be laid out in buying copyhold lands (*Re Coyte's Estate and Re Liverpool Dock Acts* (1851), 1 Sim. (N. S.) 202) or freeholds (*Re Brasher's Trust* (1858), 6 W. R. 406; *Re Parker's Estate* (1872), L. R. 13 Eq. 495); but as to apportioned rights in leaseholds, see p. 147, *post*. As to purchasing land in the Isle of Man, see *Re Taylor's Estate* (1871), 40 L. J. (CH.) 454.

(*k*) *Re Cheltenham and Great Western Rail. Co., Ex parte Craven* (1848), 17 L. J. (CH.) 215; *Re Portadown, Dungannon and Omagh Junction Rail. Co.* (1876), 10 I. R. Eq. 368.

buildings has been authorised in cases where it was for the benefit of the estate or trust, on the ground that this was equivalent to a purchase (*l*).

Replacing buildings.

If the money has been paid into the Bank in respect of any buildings taken under the special Act or injured by the proximity of the works, the money may be applied in removing or replacing such buildings or substituting others in their stead in such manner as the court may direct (*m*).

Under Settled Land Acts.

In addition to these modes of applying the money, it may be invested or applied as capital money under the Settled Land Acts whenever it is liable to be laid out in the purchase of land to be made subject to a settlement (*n*), and by the term "settlement" is not meant a settlement as defined in those Acts, but the provision is applicable in all cases where the land stands limited as provided in the Lands Clauses Acts (*o*).

As the money is to be laid out in lands or buildings to stand limited to the same uses as the lands purchased stood limited, the money in the Bank for the purposes of descent is deemed to be reconverted into land until some person becomes entitled absolutely, when the constructive reconversion can be stopped (*p*).

Money in hands of trustees.

163. When the purchase-money or compensation has been paid to trustees instead of being paid into the Bank, such money and the produce arising therefrom must be applied by the trustees in

(*l*) *Re London and North Western Railway Act, Ex parte Liverpool Corporation* (1866), 1 Ch. App. 596 ; *Re Leigh's Estate* (1871), 6 Ch. App. 887 ; *Drake* v. *Trefusis* (1875), 10 Ch. App. 364. Orders for the application of the money in buildings and improvements are now usually made under the powers contained in the Settled Land Acts. See *infra*. Money paid for part of a glebe has been allowed to be laid out in building a new rectory (*Re Whitfield (Incumbent)* (1861), 1 John. & H. 610; *Ex parte Bradfield St. Claire (Rector)* (1875), 32 L. T. 248 ; *Ex parte Hartington (Rector)* (1875), 23 W. R. 484 ; *Ex parte Claypole (Rector)* (1873), L. R. 16 Eq. 574; *Ex parte St. Botolph, Aldgate (Vicar)*, [1894] 3 Ch. 544).

(*m*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 69. Thus, money paid for land taken by a railway company has been authorised to be laid out in removing and altering farm buildings rendered unsafe or unsuitable by reason of the construction of the railway (*Re Johnson's Settlements* (1869), L. R. 8 Eq. 348) ; and in building new ones (*Re Oxford, Worcester and Wolverhampton Rail. Co., Ex parte Milward* (1859), 29 L. J. (CH.) 245 ; *Re Kent Coast Rail. Co., Ex parte Canterbury (Dean)* (1862), 10 W. R. 505 ; *Re Buckinghamshire Rail. Co., Ex parte Bicester (Churchwardens)* (1848), 5 Ry. & Can. Cas. 205) ; money paid for almshouses may be ordered to be laid out in building others (*Re Southampton and Dorchester Railway Act, Ex parte Thorner's Charity* (1848), 12 L. T. (o. s.) 266 ; and see *Re St. Thomas's Hospital* (1863), 11 W. R. 1018).

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38). For the application of moneys under these Acts, see title REAL PROPERTY AND CHATTELS REAL.

(*o*) *Ex parte Castle Bytham (Vicar) and Ex parte Midland Rail. Co.*, [1895] 1 Ch. 348 ; *Re Byron's Charity* (1883), 23 Ch. D. 171 ; and see *Kelland* v. *Fulford* (1877), 6 Ch. D. 491.

(*p*) *Kelland* v. *Fulford, supra ; Dearberg* v. *Letchford* (1895), 72 L. T. 489 ; *Re Harrop's Estate* (1857), 3 Drew. 726 ; *Dixie* v. *Wright* (1863), 32 Beav. 662. For cases under different provisions in special Acts, see *Midland Counties Rail. Co.* v. *Oswin* (1844), 1 Coll. 80 ; *Re Taylor's Settlement* (1852), 9 Hare, 596 ; *Re Robertson* (1857), 26 L. J. (CH.) 349; *Re Skeggs' Settlement* (1865), 2 De G. J. & Sm. 533, C. A. ; *Re Stewart, Ex parte Cramer* (1852), 1 Sm. & G. 32. Money in court under s. 78 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), has been treated as personalty. See *Re East Lincolnshire Railway Act* (1851), 1 Sim. (N. S.) 260, and compare *Re Tugwell* (1884), 27 Ch. D. 309.

SECT. 2. Persons under Disability.

the same modes as when paid into the Bank, but it is not necessary to obtain any order of the court for that purpose (*q*).

SUB-SECT. 5.—*Payment to Persons becoming absolutely entitled.*

Payment out.

164. The money paid into the Bank is also payable under order of the court to any party becoming absolutely entitled (*r*). For example, it is payable to a person on coming of age, if he is then entitled to it for his own use (*s*), and to tenants in tail (*t*). Statutory bodies, whether with or without power of sale of land, may be entitled to have the money paid out to them (*a*). Trustees with power of sale (*b*) and trustees of charities, when the consent of the Charity Commissioners to the sale is not required (*c*), may be authorised to receive payment out. If the consent of the Charity Commissioners is required to the sale, and is not obtained to the payment out, the fund may be transferred to the account of the Official Trustees of Charitable Funds (*d*). The transfer of the fund to another account not in the name of the promoters is equivalent to payment out (*e*). When a small sum remains after a permanent purchase or investment, the court may authorise it to be paid out to trustees to be applied in permanent improvements (*f*), and if the balance remaining does not exceed £20, it may be paid out to the parties entitled to the rents and profits (*g*).

(*q*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 71. As to the payment of such money to trustees, see p. 109, *ante*.

(*r*) *Ibid.*, s. 69. See *Ex parte Woolwich Corporation* (1908), 25 T. L. R. 370.

(*s*) *Kelland* v. *Fulford* (1877), 6 Ch. D. 491, *per* JESSEL, M.R. at p. 495; and see for other examples *Re Hall's Estate* (1870), L. R. 9 Eq. 179; *Re Cant's Estate* (1859), 4 De G. & J. 503, C. A. For a case where the payment out was postponed, as the title was possessory, see *Re Harris, Ex parte London County Council*, [1901] 1 Ch. 931.

(*t*) There has been some diversity of opinion as to whether a disentailing deed is necessary; see and compare *Re Butler's Will* (1873), L. R. 16 Eq. 479; *Re Norcop's Will* (1874), 31 L. T. 85; *Re South Eastern Rail. Co.* (1861), 30 Beav. 215; *Notley* v. *Palmer* (1865), L. R. 1 Eq. 241; and *Re Row* (1874), L. R. 17 Eq. 300. The disentailing deed may be dispensed with when the fund is small (*Sowry* v. *Sowry* (1860), 8 W. R. 339; *Re Watson* (1864), 10 Jur. (N. S.) 1011, C. A.; *Re Tylden's Trust* (1863), 11 W. R. 869).

(*a*) *Re Chelsea Waterworks Co.* (1887), 56 L. T. 421; *Re Brumby and Frodingham Urban District Council* (1904), 69 J. P. 96; *Re Islington Borough Council* (1907), 71 J. P. 396; *Ex parte King's College, Cambridge*, [1891] 1 Ch. 677.

(*b*) *Re Gooch's Estate* (1876), 3 Ch. D. 742; *Re Hobson's Trusts* (1878), 7 Ch. D. 708, C. A.; *Re St. Luke's, Middlesex (Vestry)*, [1880] W. N. 58; *Re Thomas' Settlement* (1882), 30 W. R. 244; *Re London, Brighton, and South Coast Rail. Co., Ex parte Bowman*, [1888] W. N. 179. Compare *Re Smith, Ex parte London and North Western Rail. Co. and Midland Rail. Co.* (1888), 40 Ch. D. 386, C. A.; *Re Morgan, Smith* v. *May*, [1900] 2 Ch. 474. As to trustees under the Settled Land Acts, see *Re Rutland's (Duke) Settlement* (1883), 49 L. T. 196; *Re Wright's Trusts* (1883), 24 Ch. D. 662; *Re Harrop's Trusts* (1883), 24 Ch. D. 717; *Cookes* v. *Cookes* (1887), 34 Ch. D. 498.

(*c*) *Re Faversham Charities* (1862), 5 L. T. 787; *Ex parte Haberdashers' Co.* (1886), 55 L. T. 758; *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, C. A.; *Re Sheffield Corporation and St. William's Roman Catholic Chapel and Schools, Sheffield*, [1903] 1 Ch. 208; and see *Re Islington Borough Council* (1907), 97 L. T. 78.

(*d*) *Re Bristol Grammar School Estates* (1878), 47 L. J. (CH.) 317; *Ex parte Bishop Monk's Horfield Trust (Trustees)* (1881), 29 W. R. 462; *Re St. Alban's, Wood Street (Rector)* (1891), 66 L. T. 51.

(*e*) *Melling* v. *Bird* (1853), 22 L. J. (CH.) 599; *Re Buckingham* (1876), 2 Ch. D. 690, C. A.

(*f*) *Re Kinsey* (1863), 1 New Rep. 303; *Ex parte Barrett* (1850), 19 L. J. (CH.) 415.

(*g*) *Re Egremont (Lord)* (1848), 12 Jur. 618; *Re London and Birmingham Rail.*

SECT. 3.—*Money deposited in respect of Leases or Reversions.*

SECT. 3. Money deposited in respect of Leases or Reversions.

Leaseholds or reversions.

165. When the money or compensation in the Bank has been paid in respect of any lease or agreement for a lease (*h*) for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, the court may, on the application of any party interested in such money (*i*), order it to be laid out, invested, or accumulated and paid, in such manner as the court may consider will give the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money was paid, or as near thereto as may be (*k*). Such orders may also be made in respect of money paid for renewable leaseholds (*l*), or in respect of compensation for leaving minerals unworked so as to afford support, when such minerals have been let on lease (*m*).

Distribution.

The method of distribution depends on the nature of the interests of the parties. Thus, if a leasehold had been settled on a person for life with remainder over, such person is entitled to be paid such yearly sum raised out of the dividends and corpus as will exhaust the fund in the number of years which the lease had to run (*n*). In cases where the lease would have terminated during the life of the tenant for life, he is entitled to the whole sum, so that if he has only been paid the dividends during the continuance of the lease he becomes entitled at its termination to have the corpus paid to him (*o*). But if the lease is renewable from time to time so as to be practically perpetual, the tenant for life is only entitled to the dividends (*p*). If a person is entitled to an annuity charged on the leaseholds, and the dividends are not sufficient to pay it, a

Co. Act, Ex parte Loughton (Rector) (1849), 5 Ry. & Can. Cas. 591 ; *Re Hichin's Estate* (1853), 1 W. R. 505; *Re Bateman's Estate* (1852), 21 L. J. (CH.) 691 ; *Ex parte Sheffield (Vicar)* (1904), 68 J. P. 313.

(*h*) "Lease" includes "agreement for a lease." See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 3, and *Re King's Leasehold Estates, Ex parte East of London Rail. Co.* (1873), L. R. 16 Eq. 521.

(*i*) The application is made by summons in the cases provided for in R. S. C., Ord. 55, r. 2, and in other cases by petition. As to service on the remainderman on applications by tenants for life, see *Re Crane's Estate* (1869), L. R. 7 Eq. 322. A tenant who has received notice to quit from the owner is not a party interested in the money (*Ex parte Nadin* (1848), 17 L. J. (CH.) 421).

(*k*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 74. Compare the like provision in the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 34.

(*l*) *Re Wood's Estate* (1870), L. R. 10 Eq. 572.

(*m*) *Re Barrington, Gamlen* v. *Lyon* (1886), 33 Ch. D. 523 ; *Cardigan* v. *Curzon Howe* (1898), 14 T. L. R. 550. Compare *Re Robinson's Settlement Trusts*, [1891] 3 Ch. 129.

(*n*) *Askew* v. *Woodhead* (1880), 14 Ch. D. 27, C. A., approving *Re Phillips' Trust* (1868), L. R. 6 Eq. 250; *Re Sewell's Trusts* (1870), 23 L. T. 835 ; *Re Hunt's Estate*, [1884] W. N. 181. To the like effect, see *Re Walsh's Trust* (1881), 7 L. R. Ir. 554; *Re South City Market Co., Ex parte Bergin* (1884), 13 L. R. Ir. 245.

(*o*) *Re Beaufoy's Estate* (1852), 1 Sm. & G. 20 ; *Phillips* v. *Sarjent* (1848), 7 Hare, 33.

(*p*) *Re Wood's Estate* (1870), L. R. 10 Eq. 572 ; and see *Hollier* v. *Burne* (1873), L. R. 16 Eq. 163 ; *Maddy* v. *Hale* (1876), 3 Ch. D. 327, C. A. ; *Re Barber's Settled Estates* (1881), 18 Ch. D. 624.

SECT. 3.
Money deposited in respect of Leases or Reversions.

portion of the corpus will be sold from time to time to make up the deficiency (*q*).

When the money in the Bank is in respect of reversions dependent on leases, a tenant for life is entitled to no more than the rent he received as lessor so long as the lease would have continued. So if the land was let at less than the rack rent, or if during the term the property had increased in value, he will only be paid the amount of the rent out of the dividends, and the balance will be accumulated until the end of the lease (*r*), after which he will be entitled to the dividends on the whole sum (*s*). In the case of leases renewable at certain times on payment of a fine, the person entitled to the rents and profits will be entitled at such periods to a sum equal to such fine (*t*). In the case of compensation paid for minerals required to be left unworked, which would have been worked out during the life of the tenant for life, and in respect of which he would have received royalties, the sum will be apportioned as rent accruing *de die in diem* to the tenant for life during whose tenancy the mineral would have been worked out (*a*). In cases of property held by corporations not for their own beneficial interest, the court may authorise the whole of the dividends to be paid out, although in excess of the rent received (*b*).

Part XII.—Costs when Money deposited.

SECT. 1.—*Power of the Court to give Costs.*

Costs of dealing with deposited money.

166. Where the Lands Clauses Acts are incorporated in the special Act (*c*), the court has power in all cases of moneys deposited in the Bank of England under the provisions of those Acts or the

(*q*) *Re London, Brighton, and South Coast Rail. Co., Ex parte Wilkinson* (1849), 3 De G. & Sm. 633 ; *Re Treacher's Settlement* (1868), 18 L. T. 810.

(*r*) *Re Wooton's Estate* (1866), L. R. 1 Eq. 589; *Re Wilkes' Estate* (1880), 16 Ch. D. 597 ; *Re Mette's Estate* (1868), L. R. 7 Eq. 72 ; *Cottrell* v. *Cottrell* (1885), 28 Ch. D. 628 ; *Re Bowyer's Estate*, [1892] W. N. 48. As regards ecclesiastical property, to the like effect see *Re South Western Railway Co.'s Acts, Ex parte Lambeth (Rector)* (1846), 4 Ry. & Can. Cas. 231 ; *Ex parte Winchester (Bishop)* (1852), 10 Hare, 137 ; *Ex parte Gloucester (Dean)* (1850), 19 L. J. (CH.) 400 ; *Ex parte Christchurch (Dean)* (1853), 23 L. J. (CH.) 149 ; *Re Wimbledon and Croydon Railway Act, Ex parte Canterbury (Archbishop)* (1854), 23 L. T. (O. S.) 219.

(*s*) *Re Wilkes' Estate* (1880), 16 Ch. D. 597.

(*t*) *Ex parte St. Paul's (Precentor)* (1855), 1 K. & J. 538 ; *Ex parte Winchester (Bishop), supra ;* and see *Ex parte Westminster (Dean)* (1854), 18 Jur. 1113.

(*a*) *Cardigan* v. *Curzon Howe* (1898), 14 T. L. R. 550 ; *Re Barrington, Gamlen* v. *Lyon* (1886), 33 Ch. D. 523 ; and compare *Re Robinson's Settlement Trusts*, [1891] 3 Ch. 129.

(*b*) *Re Westminster (Dean), Re Hampstead Junction Rail. Co.* (1858), 26 Beav. 214 ; *Ex parte St. Thomas' Church Lands and Temple Church Lands (Trustees), Bristol* (1870), 23 L. T. 135 ; *Re South Western Railway Co.'s Acts, Ex parte Lambeth (Rector), supra.*

(*c*) As to incorporation, see p. 12, *ante.* This is subject to any variation in the special Act of the provisions in the Lands Clauses Acts, as to which see *R.* v. *St. Katharine's Dock Co.* (1866), 14 W. R. 978.

SECT. 1.
Power of the Court to give Costs.

special Act, whether deposited as security before entry (*d*) or as purchase-money or compensation (*e*), to order the promoters to pay the costs of the matters hereinafter referred to (*f*), except where the money has been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same or to convey or release the lands in respect whereof the same was payable, or by reason of the wilful neglect of any party to make out a good title to the land required (*g*).

Refusal to convey.

By wilful refusal or neglect is meant a refusal or neglect without any reason (*h*), or with only a frivolous reason, or by imposing an improper condition, such as the prior payment of costs (*i*); but if the vendor has a substantial reason, whether invalid or not, the refusal or neglect is not considered wilful (*k*). A refusal is not wilful because the award or the service of the notice to treat is on substantial, though wrong, grounds considered invalid (*l*), or because the vendor is advised by legal opinion that the promoters have no power to take the land (*m*), or because the vendor has not paid off incumbrances which exceed the price to be paid for the land or procured the holders to join in the conveyance(*n*).

In these excepted cases, and in all cases of money deposited in court under Acts not incorporating the Lands Clauses Acts, the costs of and incident to all proceedings in the Supreme Court are in the discretion of the court or judge unless there are express statutory provisions to the contrary (*o*).

(*d*) As to such deposit, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 85, and p. 99, *ante*, and as to payment of costs, *Re London, Brighton, and South Coast Rail. Co., Ex parte Flower* (1866), 1 Ch. App. 599; *Ex parte Morris* (1871), L. R. 12 Eq. 418; *Charlton* v. *Rolleston* (1884), 28 Ch. D. 237, C. A. Costs are not so payable if money is deposited by agreement in a bank other than the Bank of England (*Re Eastern Counties and Tilbury Junction Rail. Co., Ex parte Cave* (1855), 26 L. T. (o. s.) 176).

(*e*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 69, 71, 76, and see pp. 107, 109, *ante*.

(*f*) These costs cannot be ordered to be paid out of any specific fund (*Re Neath and Brecon Rail. Co.* (1874), 9 Ch. App. 263; *Ex parte Great Northern Rail. Co.* (1848), 5 Ry. & Can. Cas. 269).

(*g*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80. This provision is not affected by R. S. C., Ord. 65, giving the court a discretion as to costs (*Reeve* v. *Gibson*, [1891] 1 Q. B. 660, C. A.; *Hasker* v. *Wood* (1885), 54 L. J. (Q. B.) 419, C. A.).

(*h*) See *Re Dublin Corporation, Ex parte Dowling* (1881), 7 L. R. Ir. 173.

(*i*) *Re Turner's Estate and Metropolitan Railway Act*, 1860 (1861), 5 L. T. 524.

(*k*) *Re Windsor, Staines and South Western Railway Act* (1850), 12 Beav. 522; *Ex parte Birkbeck Freehold Land Society* (1883), 24 Ch. D. 119; *Re Leeds Grammar School* (1900), 70 L. J. (CH.) 89.

(*l*) *Re East India Docks and Birmingham Junction Railway Act, Ex parte Bradshaw* (1848), 16 Sim. 174; *Ex parte Railston* (1851), 15 Jur. 1028; *Re Metropolitan District Rail. Co., Ex parte Lawson* (1868), 17 W. R. 186.

(*m*) *Re Ryde Commissioners, Ex parte Dashwood* (1856), 26 L. J. (CH.) 299; *Re St. Luke's Vestry, Middlesex, and London School Board*, [1889] W. N. 102.

(*n*) *Re Crystal Palace Rail. Co. and Re Divers* (1855), 1 Jur. (N. S.) 995; *Re Nash* (1855), 1 Jur. (N. S.) 1082.

(*o*) Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; and see for example, *Re Schmarr*, [1902] 1 Ch. 326, C. A.; *Re Fisher*, [1894] 1 Ch. 450, C. A.

SECT. 2. Costs for which Promoters are liable.

SECT. 2.—*Costs for which Promoters are liable.*

SUB-SECT. 1.—*In General.*

Costs to be paid by promoters.

167. When moneys have been deposited in the Bank the promoters may be ordered under the Lands Clauses Acts (*p*) to pay the costs of the following matters, including all reasonable charges and expenses incident thereto, that is to say (1) of the purchase or taking of the lands, or which have been incurred in consequence thereof, other than such costs as are otherwise provided for under those Acts; (2) of the investment of such moneys in Government or real securities or other securities in which cash under the control of the court may be invested (*q*); (3) of the reinvestment thereof in other lands; (4) of obtaining the proper orders for any of these purposes, and of the orders for the payment of dividends and interest on the securities in which such moneys are invested, and for the payment out of court of the principal of such moneys or of the securities; and (5) of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants.

SUB-SECT. 2.—*Of purchasing and taking Lands.*

Additional costs of purchase.

168. Most of the costs of purchasing and taking lands are otherwise provided for (*r*), but if additional costs are incurred in applications to the court which are rendered necessary by reason of lunacy (*s*) or because of the existence of an administration suit (*t*), the promoters may be ordered to pay such additional costs.

Costs of unnecessary proceedings.

When the money has been deposited as security before entry by the promoters, they may be ordered to pay certain costs connected with the taking of the land, but not costs the payment of which is provided for under other sections although these in fact remain unpaid (*a*). Thus, they have been ordered to pay the vendor's costs occasioned by the summoning of a jury to assess the compensation, which, owing to an agreement between the parties, became unnecessary (*b*), also the costs of assessing the compensation when the provisions of the Lands Clauses Acts as to costs were not incorporated in the special Act (*c*). When part of land subject to leases has been taken, the promoters have been ordered to pay the costs of apportioning the rents among the various parties,

Of apportioning rents.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.

(*q*) As to such investment, see *ibid.*, s. 70, and p. 117, *ante*. As to costs of investing in such other securities, see *Re Metropolitan and District Railways Acts, Ex parte St. John Baptist College, Oxford* (1882), 22 Ch. D. 93, C. A.; *Re Hanbury*, [1883] W. N. 116; *Re Brown* (1890), 63 L. T. 131, C. A.; *Re Gaselee*, [1901] 1 Ch. 923.

(*r*) *E.g.*, Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 24, 34, 51, 67, 82, 83.

(*s*) *Re Taylor and York and North Midland Rail. Co.* (1849), 1 Mac. & G. 210; *Re Walker, Ex parte Manchester and Leeds Rail. Co.* (1851), 7 Ry. & Can. Cas. 129; *Re Briscoe* (1864), 2 De G. J. & Sm. 249, C. A.

(*t*) *Haynes* v. *Barton* (1861), 30 L. J. (CH.) 804, 808, and (1866) L. R. 1 Eq. 422; *Picard* v. *Mitchell* (1850), 12 Beav. 486.

(*a*) *Ex parte Great Northern Rail. Co.* (1848), 5 Ry. & Can. Cas. 269; and see *Haynes* v. *Barton* (1861), 9 W. R. 777.

(*b*) *Ex parte Morris* (1871), L. R. 12 Eq. 418.

(*c*) *Re Pardoe's Account and Epping Forest Act*, 1878, [1882] W. N. 33.

SECT. 2. Costs for which Promoters are liable.

whether done by justices or by agreement, and also the costs incurred in regard to settling accommodation works (*d*). Similarly, when after entry the undertaking was abandoned subject to compensation to the landowner for disturbance, the promoters have been ordered to pay the costs of ascertaining this compensation (*e*), but the court has only power to make a general order as to these costs, and cannot order them to be paid out of the money deposited (*f*).

Ascertaining compensation for disturbance.

SUB-SECT. 3.—*Of Interim Investment.*

Costs of interim investments.

169. Pending the permanent application of the money in the Bank, the promoters may be ordered to pay the costs of interim investments in real or other authorised securities, even although a contract for the purchase of land as a permanent investment has been entered into (*g*), and such order does not affect the liability of the promoters to pay the costs of a subsequent permanent investment (*h*). The court has also power to order the promoters to pay the costs of more than one interim investment (*i*), as, for example, of an investment on mortgage when under a previous order the money has been invested in Consols (*k*). Such an investment on mortgage may, however, be treated as a permanent investment (*l*). When the money is ordered to be invested in stock the official broker must be employed (*m*), and the whole sum ordered must be invested, as the promoters are required to pay the broker's charges (*n*). In practice these are paid in the first instance by the applicant and recovered from the promoters as part of his reasonable costs and charges (*o*).

SUB-SECT 4.—*Of Reinvestment in other Lands.*

Costs of reinvestment.

170. When it appears to the court that it is for the benefit of the parties interested in the moneys that the same should be invested in the purchase of lands in different sums and at different times, the court may, if it thinks fit, order the costs of any such

(*d*) *Re London, Brighton and South Coast Rail. Co., Ex parte Flower* (1866), 1 Ch. App. 599; and see *Re Hampstead Junction Rail., Ex parte Buck* (1863), 1 Hem. & M. 519.

(*e*) *Charlton* v. *Rolleston* (1883), 28 Ch. D. 237, C. A.

(*f*) *Re Neath and Brecon Rail. Co.* (1874), 9 Ch. App. 263.

(*g*) *Re Liverpool etc. Rail. Co.* (1853), 17 Beav. 392.

(*h*) *Re Dodd's Estate* (1871), 19 W. R. 741; *Re Wilkinson's Trust* (1868), 18 L. T. 17; *Re Gaselee*, [1901] 1 Ch. 923, at p. 928.

(*i*) *Re Blyth's Trust* (1873), L. R. 16 Eq. 468, *per* Lord SELBORNE, L.C., at p. 469; *Re Hereford, Hay, and Brecon Rail. Co.* (1864), 13 W. R. 134; *Re Nepton's Charity* (1906), 22 T. L. R. 442.

(*k*) *Ibid.*, and *Re Sewart's Estate* (1874), L. R. 18 Eq. 278; *Re William Smith's Estate* (1870), L. R. 9 Eq. 178; *Reading* v. *Hamilton* (1862), 5 L. T. 628. Previous to the decision in *Re Blyth's Trust, supra*, the practice on this matter was unsettled. See *Re Lomax* (1864), 34 Beav. 294; *Re Flemon's Trusts* (1870), L. R. 10 Eq. 612. For a case of reinvestment in stock, see *Re Brown* (1890), 63 L. T. 131, C. A.

(*l*) *Re Gedling Rectory* (1885), 53 L. T. 244.

(*m*) *Re West Riding and Lancashire Railways Bill*, [1876] W. N. 48, 80; *Ex parte Bolton Junction Rail. Co.* (1876), 24 W. R. 451.

(*n*) *Ex parte Trinity House Corporation* (1843), 3 Hare, 95; *Re Kendal and Westmoreland Railway Act and Re Braithwaite's Trust* (1853), 1 Sm. & G., Appendix XV.; *Re Gaselee*, [1901] 1 Ch. 923.

(*o*) *Re Gaselee, supra*, at p. 927; and see *Re Wilson* (1853), 1 W. R. 504; *Re Magdalen College, Oxford*, [1901] 2 Ch. 786.

SECT. 2. Costs for which Promoters are liable.

investments to be paid by the promoters, but otherwise the costs of one application only for reinvestment in land are allowed (*p*). If, however, the reinvestment is made in different sums at different times, the court will order the promoters to pay the costs of each reinvestment, unless the promoters can show that such reinvestments are capricious, vexatious, or unnecessary (*q*).

Several funds.

Where the money is invested along with other moneys provided by the applicant, the promoters will be ordered to pay the whole costs of reinvestment except so far as they are increased by reason of the purchase-money exceeding the moneys deposited (*r*). If there are two or more funds deposited in the Bank, and these are invested together, promoters are entitled to a contribution from the other companies and corporations who are under a like obligation to pay the costs (*s*). The general costs of the application and of the purchase are borne equally, unless there are special circumstances, of which the inequality of the amounts is not necessarily one (*t*), but the *ad valorem* stamp, the surveyor's fee, and, in some cases, the solicitor's charges, have been apportioned rateably (*a*). If some of the parties who have paid money into the Bank are not liable to pay costs, the other promoters are only liable to pay the proportion they would have been liable to pay if all had been liable (*b*). If some

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.

(*q*) *Re Brandon's Estate* (1862), 2 Drew. & Sm. 162, at p. 166; *Re St. Bartholomew's Hospital (Trustees)* (1859), 4 Drew. 425, at p. 426; *Ex parte Fishmongers' Co.* (1862), 1 New Rep. 85; *Re Woolley's Estate* (1853), 17 Jur. 850; and compare *Re London and Birmingham Rail. Co., Ex parte Eton College (Provost)* (1842), 3 Ry. & Can. Cas. 271; *Re London and Birmingham Rail. Co., Ex parte Waste Lands of Boxmoor (Trustees)* (1844), 3 Ry. & Can. Cas. 513; *Re St. Katharine's Dock Co.* (1844), 3 Ry. & Can. Cas. 514; *Re London and Birmingham Railway to Northampton, Ex parte Bouverie* (1846), 4 Ry. & Can. Cas. 229; *Re Merchant Taylors' Co.* (1847), 10 Beav. 485; *Jones* v. *Lewis* (1850), 2 Mac. & G. 163; *Ex parte St. Katharine's Hospital* (1881), 17 Ch. D. 378, decided under similar provisions in special Acts.

(*r*) *Re Clark*, [1906] 1 Ch. 615; *Re Metropolitan Rail. Co. and Gonville and Caius College* (1887), [1906] 1 Ch. 619, n, stating the principle laid down in *Re Sheffield and Lincolnshire Rail. Act, Ex parte Hodge* (1848), 16 Sim. 159; *Re Southampton and Dorchester Rail. Co., Ex parte King's College, Cambridge* (1852), 5 De G. & Sm. 621; *Re Branmer's Estate* (1849), 14 Jur. 236; *Re Loveband's Settled Estates* (1860), 30 L. J. (CH.) 94. The orders made in *Ex parte Bilston (Curate)* (1889), 37 W. R. 460, and *Re Bagot's Settled Estates* (1866), 14 W. R. 471, are not now followed.

(*s*) *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14; *A.-G.* v. *Rochester Corporation*, [1867] W. N. 142; *Ex parte Ecclesiastical Commissioners of England* (1865), 11 Jur. (N. S.) 461; *Re Metropolitan Rail. Co. and Gonville and Caius College* (1887), [1906] 1 Ch. 619, n.

(*t*) See cases cited in last note and *Ex parte Christ's Hospital (Governors)* (1864), 2 Hem. & M. 166; *Re Byron's Estate* (1863), 1 De G. J. & Sm. 358, C. A.; *Re Merton College* (1864), 1 De G. J. & Sm. 361, C. A.; *Ex parte Trinity College, Cambridge (Master etc.)* (1868), 18 L. T. 849; and see *Re Leigh's Estate* (1871), 6 Ch. App. 887; *Re Manchester and Leeds Rail. Co., Ex parte Gaskell* (1876), 2 Ch. D. 360; *Ex parte Christ's Hospital (Governors)* (1879), 27 W. R. 458.

(*a*) *Re Bishopsgate Foundation*, [1894] 1 Ch. 185; *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14; *Ex parte London Corporation* (1868), L. R. 5 Eq. 418; and see *Ex parte Christchurch* (1861), 9 W. R. 474; *Ex parte St. Bartholomew's Hospital (Governors)* (1875), L. R. 20 Eq. 369; *A.-G.* v. *St. John's Hospital, Bath*, [1893] 3 Ch. 151.

(*b*) Thus, in a case where there were seventeen separate funds in court, and six of the respondents were not liable to pay costs, the remaining eleven companies were

SECT. 2. Costs for which Promoters are liable.

of the companies who have deposited moneys have amalgamated, they will be treated for the purposes of costs as one company (*c*).

If the deposited money belongs to persons who have become absolutely entitled, the promoters may be ordered to pay the costs of reinvestment (*d*), and they may also be ordered to do so in cases where, by reason of the death of the owner, the land purchased will be held to uses differing from those in existence when the land was taken (*e*).

Abortive applications.

If the court does not sanction the proposed investment, the promoters are not required to pay the costs of the abortive application, and may be allowed their costs out of the fund deposited (*f*), and if the applicant has acted *bonâ fide* for the benefit of the estate in making the application, his costs will also be allowed out of the deposited moneys (*g*). If the court approves the purchase, but it is not completed owing to the failure to make, or because of the great expense of making, a good title, the promoters are required to pay the costs (*h*), but not if the purchase is abandoned on insufficient grounds (*i*).

What included in costs payable by promoters.

171. The costs which the promoters are ordinarily required to pay on the purchase of land as a reinvestment are such costs as would in the case of an open contract be purchaser's costs (*k*). These include the costs of the reference to chambers in regard to the investigation of title, and of the conveyancing counsel to the court when necessary (*l*), and also the costs of the petitioner's solicitor, according to

ordered each to pay one seventeenth of the total costs (*Ex parte Ecclesiastical Commissioners of England* (1865), 11 Jur. (N. S.) 461; *A.-G.* v. *Rochester Corporation* (1867), 15 W. R. 765).

(*c*) *Ex parte Corpus Christi College, Oxford* (1871), L. R. 13 Eq. 334; *Ex parte Gaskell* (1876), 2 Ch. D. 360; *Re Midland Great Western Rail. Co.* (1881), 9 L. R. Ir. 16. If a line is leased, the lessors remain liable (*Re Carlisle and Silloth Rail. Co.* (1863), 33 Beav. 253; if the undertaking is assigned, the assignors become liable (*Ex parte Sheffield* (*Vicar*) (1904), 68 J. P. 313).

(*d*) *Re Jones's Trusts* (1870), 39 L. J. (CH.) 190; *Re Dodd's Trust Estate* (1871), 19 W. R. 741; and see *Re De Beauvoir's Trusts* (1860), 29 L. J. (CH.) 567, *per* TURNER, L.J., at p. 570, C. A.

(*e*) *Re De Beauvoir's Trusts, suprz; Re Benyon's Trusts*, (1860), 8 W. R. 425, C. A.; and compare *Re Parker's Estate* (1872), L. R. 13 Eq. 495; *Re Eastern Counties Rail. Co., Ex parte Peyton* (1856), 4 W. R. 380.

(*f*) *Re Hardy's Estate* (1854), 18 Jur. 370; *Ex parte Stevens* (1851), 15 Jur. 243; *Re Macdonald, Re London and Blackwall Rail. Co.* (1860), 2 L. T. 168. Promoters must pay the costs of obtaining the particular order that is made, not of that part of the summons which failed (*In re Jacobs, Baldwin* v. *Pescott*, [1908] 2 Ch. 691).

(*g*) Compare *Re Leigh's Estate* (1871), 6 Ch. App. 887; and see Lands Clauses Consolidation Act, 1845, s. 73, and p. 117, *ante*.

(*h*) *Re Woolley, Re East and West India Docks and Birmingham Junction Railway Act*, 1846 (1853), 17 Jur. 850; *Ex parte Holywell* (*Rector*) (1865), 2 Drew. & Sm. 463; *Re Carney's Trusts* (1872), 20 W. R. 407; *Re North Staffordshire Rail. Co. and the Lands Clauses Consolidation Acts, Ex parte Vaudrey* (1861), 3 Giff. 224.

(*i*) *Re Lands Clauses Consolidation Act*, 1845, *Ex parte Copley* (1858), 4 Jur. (N. S.) 297.

(*k*) *Ex parte Christ's Hospital* (*Governors*) (1875), L. R. 20 Eq. 605; *Re Temple Church Lands* (1877), 47 L. J. (CH.) 160; *Re Eastern Counties Rail. Co., Ex parte Sawston* (*Vicar*) (1858), 27 L. J. (CH.) 755; *Ex parte Thavies' Charity* (*Trustees*), [1905] 1 Ch. 403; *Re North Staffordshire Railway Act, Ex parte Alsager* (*Incumbent*) (1854), 2 Eq. Rep. 327.

(*l*) These may be dispensed with if the amount is small (*Re Blomefield's Estate*, [1876] W. N. 242; *Re Lapworth Charity*, [1879] W. N. 37). If the money is invested before the purchase is approved, the promoters are not required to pay

SECT. 2. Costs for which Promoters are liable.

the proper scale (*m*), for investigation of title and preparing and completing the conveyance (*n*). They do not include costs of private counsel, except for consultation on difficult points (*o*), nor do they include costs ordinarily paid by the vendor although the contract makes them payable by the purchaser (*p*). If, by reason of the applicants being under disability, additional costs are incurred, as where the purchasers are trustees of a charity (*q*) or hold ecclesiastical offices (*r*), or when the land or fund is the subject of a suit (*s*), the promoters may be ordered to pay the costs reasonably incurred in consequence (*t*).

Sundry purposes.

172. If the money is laid out in the purchase of copyholds, the promoters are required to pay the fees of admission, but not the fines (*u*); if in the enfranchisement of copyholds, they pay the costs of the application and of the enfranchisement (*a*); if in redeeming land tax, they likewise pay the costs of the application and of the redemption (*b*); but if it is employed in discharging incumbrances or in the purchase of leaseholds by the reversioner, the practice is to order the promoters to pay only the costs of the application to the court and of getting the money paid out, but not of the reinvestment (*c*). If the money is applied in erecting buildings, whether in substitution for others or not, this is treated as a payment out, and the promoters pay only the costs of the application and of the payment out (*d*). Thus, the costs of planning and

the costs of purchase (*Ex parte Bouverie* (1848), 5 Ry. & Can. Cas. 431; *Ex parte Bishop Monk's Horfield Trust* (*Trustees*) (1881), 29 W. R. 462).

(*m*) Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44); General Order (1882), Sched. I., Part I.

(*n*) *Re Merchant Taylors' Co.* (1885), 30 Ch. D. 28, C. A.; and see *Re Stewart* (1889), 41 Ch. D. 494.

(*o*) *Re Jones's Settled Estates* (1858), 6 W. R. 762.

(*p*) See cases cited in note (*k*), p. 129, *ante*.

(*q*) *Re Christ's Hospital* (*Governors*) (1864), 12 W. R. 669, but not the costs connected with a new scheme when required for other reasons than the taking of the land (*Re St. Paul's School, Finsbury* (1883), 52 L. J. (CH.) 454).

(*r*) *Ex parte Creech St. Michael* (*Vicar*) (1852), 21 L. J. (CH.) 677.

(*s*) *Carpmael* v. *Profitt* (1853), 17 Jur. 875.

(*t*) See also *Armitage* v. *Askham* (1855), 1 Jur. (N. S.) 227; *Re Brandon's Estate* (1862), 2 Drew. & Sm. 162.

(*u*) *Re Eastern Counties Rail. Co., Ex parte Sawston* (*Vicar*) *and Wakelin's Charity* (*Trustees*) (1858), 6 W. R. 492; *Re Cann and Norfolk Railway Co.'s Acts* (1850), 15 Jur. 3

(*a*) *Re Cheshunt College* (1855), 1 Jur. (N. S.) 995; *Dixon* v. *Jackson* (1856), 25 L. J. (CH.) 588.

(*b*) *Re London, Brighton, and South Coast Rail. Co.* (1854), 18 Beav. 608, 611; *Re Shrewsbury and Hereford Railway Act, Ex parte Beddoes* (1854), 2 Sm. & G. 466; *Re Bethlehem Hospital* (1875), L. R. 10 Eq. 457; and compare *Ex parte Northwick* (1834), 1 Y. & C. (EX.) 166; *Ex parte Trafford* (1837), 2 Y. & C. (EX.) 522.

(*c*) *Re Manchester, Sheffield etc. Rail. Co., Ex parte Sheffield Corporation* (1855), 21 Beav. 162; *Re Sheffield Waterworks Co., Ex parte Sheffield Town Trustees* (1860), 8 W. R. 602; *Re Mark*, [1877] W. N. 63; *Ex parte London Corporation* (1868), L. R. 5 Eq. 418; and compare *Re Eastern Counties Rail. Co., Ex parte Hardwick* (*Earl*) (1848), 17 L. J. (CH.) 422; *Re Yeates* (1848), 12 Jur. 279; *Re Stanley of Alderley* (*Lord*) (1872), L. R. 14 Eq. 227; *Re Dublin, Wicklow and Wexford Rail. Co., Ex parte Richards* (1890), 25 L. R. Ir. 175. A different rule has been applied in the case of the purchase of leases under the Episcopal and Capitular Estates Act, 1851 (14 & 15 Vict. c. 104) (*Ex parte London* (*Bishop*) (1860), 2 De G. F. & J. 14; *Ex parte Manchester* (*Dean*) (1873), 28 L. T. 184).

(*d*) *Re Whitfield* (*Incumbent*) (1861), 1 John. & H. 610; *Re Lathropp's Charity* (1866), L. R. 1 Eq. 467; *Ex parte Claypole* (*Rector*) (1873), L. R. 16 Eq. 574;

superintending the buildings are not payable (*e*), nor of the surveyor's certificate that the works have been completed (*f*), but the costs of a certificate of the sum due will be payable by the promoters (*g*).

SUB-SECT. 5.—*Of obtaining the proper Orders.*

Cost of applications to court.

173. On applications to the court to obtain the proper orders for interim or permanent investment, or for payment out of the money or of dividends, promoters are only required to pay such costs as are reasonably and necessarily incurred. If the application is made by petition when it could have been made properly and more cheaply by summons, the promoters will only be required to pay the costs which would have been incurred on procedure by summons (*h*); and if two applications are made when one would have sufficed, the promoters will only be required to pay the costs of one (*i*). They will only be ordered to pay the costs of service upon persons necessarily served; and if such persons when served appear unnecessarily, they will not be entitled to their costs (*k*).

Persons to be served.

174. If the application is simply for the reinvestment of money in land, and there are mortgagees or annuitants whose rights

Ex parte Shipton-under-Wychwood (Rector) (1871), 19 W. R. 549; *Ex parte Gamston (Rector)* (1876), 1 Ch. D. 477. As to substituted buildings, see *Re Southampton and Dorchester Railway Act, Ex parte Thorner's Charity* (1848), 12 L. T. (o. s.) 266; *Re Chelsea Waterworks Co., Ex parte St. John's, Fulham (Minister)* (1856), 28 L. T. (o. s.) 173; *Re Kent Coast Rail. Co., Ex parte Canterbury (Dean)* (1862), 10 W. R. 505; *Re St. Thomas's Hospital* (1863), 11 W. R. 1018.

(*e*) *Re Butchers' Co.* (1885), 53 L. T. 491.

(*f*) *Ex parte Shipton-under-Wychwood (Rector), supra.*

(*g*) *Re Arden* (1894), 70 L. T. 506, C. A.

(*h*) *Re Jolliffe's Estate* (1870), L. R. 9 Eq. 668; *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541; *Bates* v. *Moore* (1888), 38 Ch. D. 381; *A.-G.* v. *St. John's Hospital, Bath,* [1893] 3 Ch. 151. As to cases where the costs of a petition have been allowed, see *Re St. Alban's, Wood Street (Rector)* (1891), 66 L. T. 51; *Re Jackson,* [1894] W. N. 50; *Re Sanders* (1894), 70 L. T. 755.

(*i*) *E.g.*, if a second order for payment of dividends is required by reason of the first order not being drawn so as to cover persons successively entitled, the court will exercise its discretion in the circumstances of the case as to ordering the promoters to pay the costs (*Re Pryor's Settlement Trusts* (1876), 35 L. T. 202; *Re Audenshaw School* (1863), 1 New Rep. 255; *Re Goe's Estate* (1854), 3 W. R. 119; *Re Bazett's Trustees* (1850), 16 L. T. (o. s.) 279; *Ex parte Ecclesiastical Commissioners* (1870), 39 L. J. (CH.) 623; *Re Grand Junction Railway Acts, Ex parte Hordern* (1848), 2 De G. & Sm. 263; *Re Metropolitan Rail. Co. and Maire,* [1876] W. N. 245; *Re Ryder* (1887), 37 Ch. D. 595, C. A.). As to payment of dividends in case of resettlement, see *Re Pick's Settlement* (1862), 31 L. J. (CH.) 495; *Re Shakespeare's Walk School* (1879), 12 Ch. D. 178. Where there are several funds in court belonging to the same trust, and one application only is necessary, the costs of one only will be allowed (*Re Wilts, Somerset and Weymouth Rail. Co., Re South Devon Rail. Co., Re Cornwall Rail. Co., Ex parte Broke (Lord)* (1863), 11 W. R. 505; *Re Pattison's Devised Estates, Re Pattison's Settled Estates* (1876), 4 Ch. D. 207; *Re Gore Langton's Estates* (1875), 10 Ch. App. 328; and compare *Re Midland Great Western Rail. Co.* (1881), 9 L. R. Ir. 16). For other examples, see *Re Spooner's Estate* (1854), 1 K. & J. 220; *Re London and North Western Railway Co.'s Act,* 1846, *and the Rugby and Stamford Railway Act,* 1846, *Re Dunstable Railway Co.'s Act,* 1845, *Ex parte Braye (Baroness)* (1863), 11 W. R. 333; *Re Long's Trust* (1864), 33 L. J. (CH.) 620; *Re Nicholls's Trust* (1866), 35 L. J. (CH.) 516.

(*k*) See R. S. C., Ord. 65, rr. 27 (19), (23), as to costs of service and appearance generally in connection with matters in the Chancery Division. Nor will promoters have to pay costs of such parts of the summons as may have failed (*Re Jacobs, Baldwin* v. *Pescott,* [1908] 2 Ch. 691).

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are not otherwise affected, the proper course is to serve such mortgagees or annuitants and to tender them 30*s.* for costs, giving them an intimation that if they appear at the hearing they will probably have to pay their own costs (*l*).

In the case of settled land, when the money is to be laid out in other land, the remainderman need not be served or appear, and costs of service upon and of appearance by him may be disallowed (*m*).

In cases of discharging incumbrances, buying copyholds, or laying out the money in buildings and improvements, the remaindermen and the trustees of the settlement should generally be served, so that they may have an opportunity of objecting (*n*).

When the money has been deposited in respect of land which is the subject of an action, the parties to the action should be served, and in a proper case will be allowed their costs of appearance (*o*).

Applications for interim investments.

Similar rules apply on an application for interim investments (*p*). Thus, mortgagees and other incumbrancers should not be served (*q*) unless they are in occupation (*r*). It is proper to serve the promoters on such applications (*s*). In cases of improper service the costs thereby occasioned may be ordered to be paid by the applicant or out of the fund (*t*), and a like order may be made where, by reason of default or delay, or failure to serve on the part of the petitioner, additional costs have been incurred (*a*).

SUB-SECT. 6.—*Of Payment out.*

Applications for payment out.

175. When a person becomes absolutely entitled, the promoters will be required to pay the costs of the application to the court for

(*l*) *Re Gore Langton's Estate* (1875), 10 Ch. App. 328, at p. 333; *Re Duggan's Trust* (1869), L. R. 8 Eq. 697.

(*m*) *Yorkshire, Doncaster and Goole Rail. Co. and Dylar's Estate* (1855), 1 Jur. (N. S.) 975; *Re Browne and Oxford and Bletchley Junction Railway Acts* (1852), 6 Ry. & Can. Cas. 733, C. A.; *Re Bowes's Estate* (1864), 10 Jur. (N. S.) 817; *Re Gore Langton's Estate, supra.*

(*n*) *Re Leigh's Estate* (1871), 6 Ch. App. 887; *Re Furness Rail. Co., Re Romney* (1863), 3 New Rep. 287; and see *Re Olive's Estate* (1890), 44 Ch. D. 316; *Re Browne* (1852), 6 Ry. & Can. Cas. 733, C. A.; *Re Cann, Re Norfolk Railway Co.'s Act* (1850), 19 L. J. (CH.) 376. Patrons of a living should also be served (*Ex parte Castle Bytham (Vicar), Ex parte Midland Rail. Co.*, [1895] 1 Ch. 348). The costs of an affidavit of service when required will be payable by the promoters (*Re Halstead United Charities* (1875), L. R. 20 Eq. 48; *Re Artisans' and Labourers' Dwellings Improvement Act*, 1875, *Ex parte Jones* (1880), 14 Ch. D. 624; *Re Ruck's Trust* (1895), 13 R. 637).

(*o*) *Haynes* v. *Barton* (1866), L. R. 1 Eq. 422; *Picard* v. *Mitchell* (1850), 12 Beav. 486; *Brandon* v. *Brandon* (1862), 2 Drew. & Sm. 162.

(*p*) *Re Dowling's Trusts* (1876), 45 L. J. (CH.) 568; *Re Finch's Estate* (1866), 14 W. R. 472; *Re Leigh's Estate, supra.*

(*q*) *Re Morris's Settled Estates* (1875), L. R. 20 Eq. 470; *Re Webster's Estate* (1854), 2 Sm. & G. Appendix vi.; *Re Lancashire and Yorkshire Rail. Co., Ex parte Smith* (1849), 6 Ry. & Can. Cas. 150; *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14; *Re Thomas's Trusts* (1864), 12 W. R. 546; *Re Smith* (1865), 14 W. R. 218; *Ex parte Cofield* (1847), 11 Jur. 1071; *Re Ruck's Trust, supra; Re Osborne's Estate*, [1878] W. N. 179.

(*r*) *Re Hungerford's Trust* (1857), 3 K. & J. 455; *Re Nash, Re London, Tilbury and Southend Railway Act*, 1852 (1855), 25 L. J. (CH.) 20.

(*s*) *Re King Edward VI. Almshouses, Saffron Walden* (1868), 37 L. J. (CH.) 664.

(*t*) *Wilson* v. *Foster* (1859), 28 L. J. (CH.) 410; *Re Whitfield (Incumbent)* (1861), 1 John. & H. 610.

(*a*) *Re Clarke's Estate* (1882), 21 Ch. D. 776; *Re Leigh's Estate, supra.*

SECT. 2. Costs for which Promoters are liable.

payment out (*b*), which will include the brokerage on the sale of the securities in which the money has been invested (*c*). The promoters will also be required to pay all costs incurred in investigating the title of the claimant (*d*), and in making good his title, such as the costs of a disentailing assurance (*e*), of a power of attorney (*f*), and of taking out letters of administration (*g*), in cases where the taking of the land has rendered these necessary when they would not otherwise have been required. The promoters are also required to pay the extra costs entailed by the owner dealing in the ordinary way with the money after it has been deposited (*h*). For example, if the land taken was the subject of a settlement, and the tenant for life exercises a power of appointment under the settlement (*i*), or if a reversioner mortgages his reversionary interest (*k*), the promoters must pay the costs of the parties requiring to be served in consequence.

Persons to be served.

176. Incumbrancers should generally be served on applications for payment out, but the costs of their appearance, if not necessary, will not be payable by the promoters (*l*). On applications by a trustee the *cestui que trust* apparently need not be served (*m*), unless his presence is necessary for the purpose of distributing the fund (*n*). Similarly, a person having an ascertained share in the fund may

(*b*) *Re Gooch's Estate* (1876), 3 Ch. D. 742 ; *Re Ellison's Estate* (1856), 25 L. J. (CH.) 379, C. A. Under special Acts not incorporating the Lands Clauses Acts a different rule applied. See *Re Eastern Counties Rail. Co., Ex parte Hardwicke (Earl)* (1848), 17 L. J. (CH.) 422 ; *Re Bristol and Exeter Rail. Co., Ex parte Gore-Langton* (1847), 11 Jur. 686.

(*c*) *Re Magdalen College, Oxford,* [1901] 2 Ch. 786 ; see also *Ex parte Emmanuel Hospital* (1908), 24 T. L. R. 261.

(*d*) *Re Spooner's Estate* (1854), 1 K. & J. 220 ; *Re Singleton's Estate* (1863), 9 Jur. (N. S.) 941.

(*e*) *Brooking* v. *South Devon Rail. Co.* (1859), 2 Giff. 31. Compare *Re Merchant Shipping Act*, 1854, *Ex parte Allen* (1881), 7 L. R. Ir. 124.

(*f*) *Re Godley* (1847), 10 I. Eq. R. 222 ; *Re Kearns, Ex parte Lurgan Urban District Council*, [1902] 1 I. R. 157. Compare *Re Belfast and Northern Counties Rail. Co., Ex parte Gilmore*, [1895] 1 I. R. 297.

(*g*) *Re Lloyd and North London Railway (City Branch) Act*, 1861, [1896] 2 Ch. 397, adopting decisions in *Re Dublin Junction Railways, Ex parte Kelly* (1893), 31 L. R. Ir. 137; *Re Midland Great Western Rail. Co., Ex parte Rorke*, [1894] 1 I. R. 146 ; and see *Re Waterford and Limerick Rail. Co., Ex parte Harlech*, [1896] 1 I. R. 507, and see p. 112, *ante*.

(*h*) *Eden* v. *Thompson* (1864), 2 Hem. & M. 6, *per* WOOD, V.-C., at p. 8 ; *Re Lye's Estate and Re Berks and Hants Extension Railway Act*, 1859 (1866), 13 L. T. 664. Compare *Re Gough's Trusts, Ex parte Great Western Rail. Co.* (1883), 24 Ch. D. 569 ; *Re Jones's Trust Estate* (1870), 18 W. R. 312 ; *Re London Street, Greenwich* (1887), 57 L. T. 673.

(*i*) *Re Brooshooft's Settlement* (1889), 42 Ch. D. 250 ; and compare *Re Byrom* (1859), 5 Jur. (N. S.) 261.

(*k*) *Re Olive's Estate* (1890), 44 Ch. D. 316.

(*l*) *Re Halstead United Charities* (1875), L. R. 20 Eq. 48 ; *Re Artisans' and Labourers' Dwellings Improvement Act*, 1875, *Ex parte Jones* (1880), 14 Ch. D. 624 ; *Re Ruck's Trust* (1895), 13 R. 637 ; *Ex parte Mercers' Co.* (1879), 10 Ch. D. 481. Compare *Re Hatfield's Estate* (No. 2) (1863), 32 Beav. 252 ; *Re Brooke* (1864), 12 W. R. 1128 ; *Re Braye's (Baroness) Settled Estates* (1863), 32 L. J. (CH.) 432.

(*m*) *Re East* (1853), 2 W. R. 111 ; *Re Gooch's Estate* (1876), 3 Ch. D. 742 ; *Re Hobson's Trusts* (1878), 7 Ch. D. 708, C. A.

(*n*) *Re Long's Trust* (1864), 10 Jur. (N. S.) 417. As to the appearance of the trustees of a settlement on the application of a person becoming entitled absolutely, see *Re Burnell's Estate* (1864), 12 W. R. 568 ; *Ex parte Metropolitan Rail. Co.* (1868), 16 W. R. 996.

SECT. 2. Costs for which Promoters are liable.

apply for payment out without serving the other persons entitled to shares, but it would be otherwise if the shares had to be ascertained (*o*).

If, by reason of the money having been deposited in respect of a lease, part of the corpus has to be sold periodically and paid out, the promoters will also be liable for the costs of such sales (*p*).

Transfer to another account.

177. When an application is made that the money be transferred to another account under the control of the court, and the name of the promoters is omitted from the title to such other account, the transfer is deemed equivalent to a payment out, and the promoters will be ordered to pay the costs of the application and transfer (*q*), and thereafter their liability ceases (*r*). If the transfer is to the credit of an action, the parties to the action should join in the application (*s*), but generally only one of them need appear (*t*). The appearance of the trustee of the settlement is usually necessary, and his costs will be allowed (*a*). On transfer to the Official Trustees of Charitable Funds the corporations or persons interested need not be served, and costs of such service will not be payable by the promoters (*b*).

Costs of unsuccessful applications.

178. The promoters are not required to pay the costs of unsuccessful applications for payment out, and the applicant may be ordered to pay the costs of the promoters (*c*).

SUB-SECT. 7.—*Of Litigation between Adverse Claimants.*

Costs of litigation between claimants.

179. Promoters are not required to pay costs of litigation between adverse claimants to the money, but if they pay money into the Bank because they know of such adverse claims they will be liable to pay the ordinary costs of investment and of payment out (*d*). They will also be required to pay the costs of proving the title of the rightful claimant, but not any additional costs

(*o*) *Re Midland Rail. Co.* (1847), 11 Jur. 1095 ; *Re Clarke's Devisees* (1858), 6 W. R. 812. As to separate applications by persons having like interests and employing the same solicitor, see *Re Nicholl's Trust* (1866), 35 L. J. (CH.) 516.

(*p*) *Re Long's Estate* (1853), 1 W. R. 226 ; *Re Edmunds* (1866), 35 L. J. (CH.) 538, C. A.

(*q*) *Melling* v. *Bird* (1853), 22 L. J. (CH.) 599 ; *Re Bristol Free Grammar School Estates* (1878), 47 L. J. (CH.) 317 ; *St. Alban's, Wood Street* (*Rector*) (1891), 66 L. T. 51.

(*r*) *Fisher* v. *Fisher* (1874), L. R. 17 Eq. 341 ; *Prescott* v. *Wood* (1868), 37 L. J. (CH.) 691 ; *Nock* v. *Nock*, [1879] W. N. 125 ; as to costs when the new account is still entitled in the name of the promoters, see *Drake* v. *Greaves* (1886), 33 Ch. D. 609 ; *Brown* v. *Fenwick* (1866), 35 L. J. (CH.) 241.

(*s*) *Melling* v. *Bird, supra ; Re Picton's Estate* (1855), 3 W. R. 327.

(*t*) *Eden* v. *Thompson* (1864), 2 Hem. & M. 6 ; and see *Dinning* v. *Henderson* (1848), 2 De G. & Sm. 485 ; *Henniker* v. *Chafy* (1860), 28 Beav. 621. Compare *Sidney* v. *Wilmer* (No. 2) (1862), 31 Beav. 338.

(*a*) *Re English's Settlement* (1888), 39 Ch. D. 556 ; *Re Burnell's Estate* (1864), 12 W. R. 568.

(*b*) *Re St. Margaret's, Leicester* (*Prebend*) (1864), 10 L. T. 221 ; *Re St. Alban's, Wood Street*, (*Rector*), *supra.*

(*c*) *Re Smith, Ex parte London and North Western Rail. Co., and Midland Rail. Co.* (1888), 40 Ch. D. 386, C. A. ; *Ex parte Winder* (1877), 6 Ch. D. 705.

(*d*) *Ex parte Palmer* (1849), 13 Jur. 781 ; *Hore* v. *Smith* (1850), 14 Jur. 55 ; *Re North London Rail. Co., Ex parte Cooper* (1865), 13 W. R. 364 ; *Re Norfolk's (Duke) Estates* (1874), 22 W. R. 817 ; *Re Courts of Justice Commissioners*, [1868] W. N. 124. If the money is paid in at the request of one of the claimants, and the other afterwards withdraws his claim, the promoters would appear not to be liable (*Re*

SECT. 2. Costs for which Promoters are liable.

caused by the adverse claim (*e*). Similarly, if the right to the fund depends on the construction of a will or other document, they will be ordered to pay one set of costs in connection therewith (*f*). If two adverse claimants mutually agree to apply for payment out, the promoters will be required to pay the costs incurred in connection with the payment out (*g*).

Different interests.

180. If several persons have interests in the fund, but such interests are not adverse, the promoters will be required to pay all the costs of determining the respective shares, including the costs of construing a will (*h*). Thus, if the money has been deposited in respect of land the subject of a mortgage, the promoters may be ordered to pay the costs of the inquiry as to the amount due to the mortgagee (*i*).

Part XIII.—Provisions for the Purchase of Particular Interests in Land.

SECT. 1.—*In General.*

Purchase of particular interests.

181. Special provisions for the purchase of lands of a particular tenure or subject to particular incidents are contained in the Lands Clauses Acts. These provisions relate to copyhold lands (*k*), common or waste lands (*l*), lands subject to mortgage (*m*), lands charged with any rent service, rent-charge, or chief or other rent, or other payment or incumbrance not previously provided for (*n*), and lands subject to leases, including yearly tenancies (*o*). There are also separate clauses dealing with interests in land which have by mistake been omitted to be purchased (*p*). These clauses are separate from and supplementary to those dealing with purchase by agreement or otherwise than by agreement, and may be applicable although these latter are not incorporated in the special Act (*q*).

English (1865), 13 W. R. 932, C. A.). If the promoters have treated both claimants as vendors and have paid two sums into court, they may have to pay the costs of both (*Re Butterfield* (1861), 9 W. R. 805).

(*e*) *Re Spooner's Estate* (1854), 1 K. & J. 220; *Re Joliffe* (1857), 3 Jur. (N. S.) 633; *Re North London Rail. Co., Ex parte Cooper* (1865), 13 W. R. 364; *Re Catling's Estate*, [1890] W. N. 75. For form of order, see *Re Cant's Estate* (1859), 1 De G. F. & J. 153, C. A.

(*f*) *Re Mid Kent Railway Act, Ex parte Styan* (1859), John. 387; *Re Tookey's Trust* (1852), 16 Jur. 708; *Ex parte Yates* (1869), 20 L. T. 940; *Re Longworth's Estate* (1853), 1 K. & J. 1.

(*g*) *Re Spooner's Estate, supra.*

(*h*) *Askew* v. *Woodhead* (1880), 14 Ch. D. 36, C. A.; *Re Gregson's Trusts* (1864), 2 Hem. & M. 504; *Re Singleton's Estate* (1863), 9 Jur. (N. S.) 941; *Re Hinks's Estate*, (1853), 2 W. R. 108; *Re Noake's Will* (1880), 28 W. R. 762; *Ex parte Collins* (1859), 19 L. J. (CH.) 244; and see *Ex parte Great Southern and Western Rail. Co.* (1877), 11 I. R. Eq. 497.

(*i*) *Re Bareham* (1881), 17 Ch. D. 329, C. A.; *Re Olive's Estate* (1890), 44 Ch. D. 316.

(*k*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 95—98.

(*l*) *Ibid.*, ss. 99—107.

(*m*) *Ibid.*, ss. 108—114.

(*n*) *Ibid.*, ss. 115—118.

(*o*) *Ibid.*, ss. 119—122.

(*p*) *Ibid.*, ss. 124—126.

(*q*) See *R.* v. *London Corporation* (1867), L. R. 2 Q. B. 292; *Wilkins* v.

SECT. 2. Copyhold Lands.

SECT. 2.—*Copyhold Lands.*

SUB-SECT. 1.—*The Tenant's Interest.*

Copyholders.

182. In order to acquire lands of copyhold or customary tenure or of the nature thereof, the promoters must first obtain from the tenant a conveyance of his interest (*r*). There are no special provisions as to the interests of tenants. The ordinary procedure to acquire land is therefore applicable. Every such conveyance must be entered on the rolls of the manor of which the same is held or of which the same is parcel (*r*). The steward of the manor is required to make the enrolment on being paid such fees as would be due to him on the surrender of the same lands to the use of a purchaser thereof (*r*), but he is not entitled to be paid any fee on admittance, although on a transfer of a parcel of land such fee would, according to the custom of the manor, be payable (*s*). Until enrolment the tenant and his heir hold the land as trustees for the promoters (*t*).

SUB-SECT. 2.—*The Rights of the Lord of the Manor.*

Lord of the manor.

183. Until enrolment the lord's rights are unaffected; and on the death of the tenant, if his heir is not admitted, the lord may bring an action of ejectment against the promoters if they are in possession (*a*). Upon enrolment of the conveyance the lord is not entitled to any fine on admittance (*b*). When enrolled the conveyance has the like effect in respect of such copyhold or customary lands as if the same had been of freehold tenure. Nevertheless, until the lands are enfranchised by virtue of the powers contained in the Lands Clauses Consolidation Act, 1845 (*c*), they continue subject to the customary fines, rents, heriots, and services (*d*). The lord is therefore entitled until enfranchisement to the same fines as would have become payable but for the taking of the land by the promoters. Thus, if the vendor dies in the interval between the date fixed for enfranchisement and the actual enfranchisement, the promoters are liable to pay the customary fines payable on such death (*e*).

Birmingham Corporation (1883), 25 Ch. D. 78; *Syers* v. *Metropolitan Board of Works* (1877), 36 L. T. 277, C. A.

(*r*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 95. For form of conveyance, see Encyclopædia of Forms, Vol. VIII., p. 105.

(*s*) *Cooper* v. *Norfolk Rail. Co.* (1849), 3 Exch. 546. If a vendor dies before completion the promoters pay as part of the costs of conveyance the steward's fees payable on admission of the customary heir in order that he may convey (*Re London United Tramways Act*, 1900, [1906] 1 Ch. 534), but not the fine on admission (*Re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900, [1908] 1 Ch. 493, C. A.

(*t*) *Grand Junction Canal Co.* v. *Dimes and Skidmore* (1838), 2 Jur. 886, 1077.

(*a*) See *Dimes* v. *Grand Junction Canal Co.* (1846), 9 Q. B. 469, Ex. Ch.; *Beaufort (Duke)* v. *Patrick* (1853), 17 Beav. 60.

(*b*) *Ecclesiastical Commissioners for England* v. *London and South Western Rail. Co.* (1854), 14 C. B. 743; *Re Wilson's Estate* (1863), 2 John. & H. 619, at p. 622.

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 96, 97.

(*d*) *Ibid.*, s. 95.

(*e*) *Leconfield (Lord)* v. *London and North Western Rail. Co.*, [1907] 1 Ch. 38;

Enfranchisement of copyholds.

184. Within three months after the enrolment, or within one month after the promoters enter upon and make use of the lands for the purposes of the works, whichever shall first happen, or if more than one parcel of land holden of the same manor is taken by them, then within one month after the last of such parcels shall have been taken or entered on by them the promoters are required to take all proper steps to procure the enfranchisement of the whole of the lands holden of the manor so taken by them (*f*). If they neglect to do so, the lord of the manor can enforce the obligation to enfranchise by mandamus (*g*). They must, therefore, apply to the lord of the manor to enfranchise the same, and they must pay him such compensation in respect thereof as shall be agreed upon between them and him. If the parties fail to agree respecting the amount of the compensation to be paid for enfranchisement, the amount will be determined as in other cases of disputed compensation (*h*).

Persons under disability are empowered to enfranchise in the same way as they may sell, the money in such cases being deposited in the Bank of England (*i*).

Compensation for enfranchisement.

185. In estimating the amount of compensation, the time at which the value of the lord's interest in the land is to be taken is the moment when the lord acquires the right to compel enfranchisement (*k*), and allowance must be made for the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold or customary lands in the promoters or by their enfranchisement (*l*). If there is delay in procuring the enfranchisement, the lord cannot on that account claim to have the compensation assessed on the basis of the improved value of the land due to the works executed by the promoters, but the basis must be the unimproved value at the above point of time (*k*). Nor is the lord entitled to have the fine usually payable on surrender (*m*); but if there is delay, he is entitled to have the loss of fines which would

Re Wilson's Estate (1863), 2 John. & H. 619, at p. 623, *per* WOOD, V.-C.; *Re Salisbury* (*Marquis*) *and London and North Western Rail. Co.* (1879), [1892] 1 Ch. 75, n., *per* JESSEL, M.R., at p. 77; *Lowther* v. *Caledonian Rail. Co.*, [1892] 1 Ch. 38, *per* LINDLEY, L.J., at p. 82, C. A. From these cases it seems that these fines would be included in the sum fixed for compensation on enfranchisement.

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 96, on the construction of which see *Lowther* v. *Caledonian Rail. Co.*, *supra*, and *per* FRY, L.J., p. 84.

(*g*) *Lowther* v. *Caledonian Rail. Co.*, *supra*, at pp. 81, 83, 84, C. A.; *Re Salisbury* (*Marquis*) *and London and North Western Rail. Co.* (1879), *supra*, *per* JESSEL M.R., at p. 76, n.

(*h*) See pp. 69, 76, *ante*.

(*i*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict c. 18), ss. 8, 69.

(*k*) *Lowther* v. *Caledonian Rail. Co.*, *supra*; *Re Salisbury* (*Marquis*) *and London and North Western Rail. Co.*, [1879] W. N. 214, [1892] 1 Ch. p. 75, n.

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 96. The Copyhold Acts have no application to this enfranchisement unless by agreement between the parties (*Re Wilson's Estate*, *supra*; *Re Salisbury* (*Marquis*) *and London and North Western Rail. Co.*, [1892] 1 Ch. 75, n.).

(*m*) *Ecclesiastical Commissioners for England* v. *London and South Western Rail. Co.* (1854), 14 C. B. 743.

SECT. 2. Copyhold Lands.

have been due from the time of vesting taken into account in fixing the amount of the compensation (*n*).

Lord must enfranchise.

186. Upon payment or tender of the agreed or determined compensation or on deposit thereof in the Bank, as the case may require (*o*), the lord of the manor is required to enfranchise (*p*), and the lands so enfranchised will for ever thereafter be held as freehold. In default of such enfranchisement by the lord of the manor, or if he fails to adduce a good title thereto to the satisfaction of the promoters, they may, if they think fit, execute a deed poll duly stamped in the manner provided in the case of the purchase of lands by them (*q*), and thereupon the lands in respect of the enfranchisement whereof such compensation shall have been deposited will be deemed to be enfranchised and be for ever after held as freehold (*r*).

Default of lord.

SUB-SECT. 3.—*Apportionment of Rents where Lands severed.*

Apportionment of rents.

187. If part only of copyhold or customary lands subject to customary or other rent is required to be taken, the apportionment of such rent may be settled by agreement between the owner of the lands and the lord of the manor on the one part and the promoters of the undertaking on the other part; if it is not so settled, then it must be determined by two justices (*s*).

Neither the enfranchisement of the part taken nor the apportionment of the rent affects in other respects any custom by or under which any copyhold or customary lands not taken are held. If any of the lands taken be released from any portion of the rents to which they were subject jointly with other lands, such last-mentioned lands will be charged with the remainder only of such rents; and, with reference to any such apportioned rents, the lord of the manor will have all the same rights and remedies over the lands to which such apportioned rents have been assigned or attributed as he had previously over the whole of the lands subject to such rents for the whole of such rents (*s*).

SECT. 3.—*Common or Waste Lands.*

SUB-SECT. 1.—*The Rights in the Soil.*

Acquiring common or waste lands.

188. The procedure when common or waste land has to be acquired is for the promoters to purchase separately (1) the right in the soil when it does not belong to the commoners, and (2) the

(*n*) *Leconfield (Lord)* v. *London and North Western Rail. Co.*, [1907] 1 Ch. 38; and compare *Re Salisbury (Marquis) and London and North Western Rail. Co.*, [1892] 1 Ch. 75, n., *per* JESSEL, M.R., at p. 77.

(*o*) See pp. 107, 109, *ante*.

(*p*) This means that the lord must execute a deed of enfranchisement (*Lowther* v. *Caledonian Rail. Co.*, [1892] 1 Ch. 73, at p. 81, C. A.). As to an acknowledgment of the promoters' right to production of documents of title in such a conveyance, see *Re Agg-Gardner* (1884), 25 Ch. D. 600. For form of deed of enfranchisement, see Encyclopædia of Forms, Vol. VIII., p. 106.

(*q*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 75, 77 and p. 108, *ante*.

(*r*) *Ibid.*, s. 97.

(*s*) *Ibid.*, s. 98.

commonable or other rights, whether the commoners own the soil or not, including in these latter any commonable or other rights to which the lord of the manor may be entitled, other than his right in the soil (*t*).

Rights in soil.

189. When the lord of the manor is entitled to the right in the soil of any lands subject to any rights of common, the compensation in respect thereof must be paid to him. If the right belongs to any person other than the commoners, it must be paid to that other person (*a*). Upon payment or tender to the lord of the manor or to such other party of the compensation which shall have been agreed or determined (*b*) in respect of the right in the soil, or on deposit thereof in the Bank of England in any of the cases in that behalf provided in regard to the purchase of land (*c*), such lord of the manor or other person is required to convey the lands to the promoters (*d*).

Conveyance.

The conveyance has the effect of vesting the lands in the promoters in like manner as if the lord of the manor or other party had been seised in fee simple of the lands at the time of executing the conveyance. In default of conveyance the promoters may, if they think fit, execute a deed poll duly stamped in the manner provided in the Lands Clauses Acts in the case of purchase of lands by them (*e*), and thereupon the lands in respect whereof the compensation shall have been deposited will vest absolutely in the promoters. After the execution of the conveyance or deed poll the promoters will be entitled as against the lord of the manor or such other party to immediate possession (*f*), subject to the commonable or other rights theretofore affecting the land, until such rights have been extinguished by payment or deposit of the compensation (*d*).

SUB-SECT. 2.—*The Commonable Rights* (*g*).

Rights of commoners.

190. After purchase of the lord's right in the soil the promoters cannot enter and take possession of the land until they have extinguished the rights of the commoners by payment or deposit of the compensation, and if they do so enter an action will lie against them for disturbance of the rights of the commoners (*f*).

(*t*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 99.

(*a*) *Ibid.* Questions sometimes arise whether the allotment of waste land upon trust for certain commonable rights takes away the right of the owner in the soil, *e.g.*, *A.-G.* v. *Meyrick*, [1893] A. C. 1; *Simcoe* v. *Pethick*, [1898] 2 Q. B. 555, C. A.

(*b*) *I.e.*, in the ordinary way provided in the Lands Clauses Acts.

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 9, 69.

(*d*) *Ibid.*, s. 100. For form of conveyance, see Encyclopædia of Forms, Vol. VIII., p. 116.

(*e*) *Ibid.*, ss. 75, 77, and pp. 108, 111, *ante*.

(*f*) *Stoneham* v. *London, Brighton, and South Coast Rail. Co.* (1871), L. R. 7 Q. B. 1.

(*g*) Power is given in certain public general Acts to extinguish or injuriously affect rights of common, *e.g.*, the Defence Act, 1854 (17 & 18 Vict. c. 67); the Commons Act, 1899 (62 & 63 Vict. c. 30). Provision for determining the compensation is usually that contained in the Lands Clauses Acts. See title COMMONS, Vol. IV., p. 441.

SECT. 3. Common or Waste Lands.

Compensation.

191. The compensation to be paid with respect to common lands or lands in the nature thereof, the right to the soil of which belongs to the commoners, as well as the compensation to be paid for commonable and other rights in or over common lands where the right in the soil does not belong to them, other than the compensation to the lord or other party entitled to the soil thereof in respect to the right in the soil thereof, may be determined between the promoters and a committee of the parties entitled to commonable or other rights in the lands (*h*), or in any other manner to which all the parties agree (*i*).

Meeting of commoners.

192. In order that a committee of commoners may be appointed for the purpose of treating with the promoters for the compensation, the promoters may convene a meeting of the parties entitled to commonable or other rights over and in such lands (*k*), among which parties will be included the lord of the manor in respect of any commonable or other rights other than his right in the soil (*l*). This meeting must be held at some convenient place in the neighbourhood of the lands, and must be called by public advertisement to be inserted once at least in two consecutive weeks in some newspaper circulating in the county or in the respective counties and in the neighbourhood in which the lands are situate, the last of such insertions being not more than fourteen nor less than seven days prior to the meeting. Notice of the meeting must also, not less than seven days previous to the holding thereof, be affixed upon the door of the church of the parish in which the meeting is intended to be held, or, if there be no such church, on some other place in the neighbourhood to which notices are usually affixed. If the lands be parcel or holden of a manor, a like notice must be given to the lord of the manor (*k*).

Committee of commoners.

193. The meeting so called may appoint a committee not exceeding five in number of the parties entitled to any such rights; and at such meeting the decision of the majority of the persons entitled to commonable rights present binds the minority and all absent parties (*m*).

Powers of committee.

The committee so chosen may enter into an agreement with the promoters for the compensation to be paid for the extinction of such commonable and other rights and all matters relating thereto for and on behalf of themselves and all other parties interested therein, and all such parties will be bound by such agreement (*n*). The committee may also receive the compensation so agreed to be paid, and the receipt of the committee, or of any three members thereof, for such compensation will be an effectual discharge for the same (*n*). The committee may further enforce the agreement as

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 101. This section extends to a case where land is held in trust for the resident freemen of a borough for purposes of grazing (*Nash* v. *Combs* (1868), L. R. 6 Eq. 55, 56).

(*i*) *Bee* v. *Stafford and Uttoxeter Rail. Co.* (1875), 23 W. R. 868.

(*k*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 102.

(*l*) *Ibid.*, s. 99. For form of notice convening meeting, see Encyclopædia of Forms, Vol. VIII., p. 114.

(*m*) *Ibid.*, s. 103.

(*n*) *Ibid.*, s. 104.

against the promoters by an action for specific performance (*o*). If the committee and the promoters fail to agree as to the amount of the compensation, it must be determined as in other cases of disputed compensation (*p*).

If, when a meeting of the parties entitled to the commonable or other rights has been duly convened by the promoters, no effectual meeting takes place, or if, taking place, such meeting fails to appoint a committee, the amount of the compensation must then be determined by a surveyor appointed by two justices, as in the manner provided in the case of parties who cannot be found (*q*).

Application of compensation money.

194. The promoters are not bound to see to the apportionment or to the application of such compensation, nor are they liable for the misapplication or non-application thereof (*r*). The committee should apportion the compensation among the several persons interested therein according to their respective interests, but if they find they cannot satisfactorily do so, or if within twelve months they fail to do so, then any three persons claiming to be interested in the money may apply to the Board of Agriculture and Fisheries to take steps for the apportionment or application of the compensation (*s*). The committee may also apply to the court to determine how the money should be distributed (*t*), but there is a doubt as to whether one of the commoners can do so (*u*).

Conveyance unnecessary.

195. Neither the committee nor the commoners are required to execute a conveyance of the commonable or other rights. Upon payment or tender to the committee, or to any three of them, of the compensation agreed or determined in respect of such rights, or if there shall be no such committee, then upon deposit in the Bank in the manner provided in the like case (*a*), the promoters may, if they think fit, execute a deed poll duly stamped in the manner provided in the case of the purchase of lands by them (*b*), and thereupon the lands in respect of which such compensation has been so paid

(*o*) See *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241, C. A.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 105; and see p. 69, *ante*, as to determination of the amount of compensation.

(*q*) *Ibid.*, s. 106; and as to the procedure where parties cannot be found, see *ibid.*, ss. 59—63, and p. 95, *ante*.

(*r*) *Ibid.*, s. 104.

(*s*) *Ibid.*, s. 104; Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 22; Inclosure Act, 1854 (17 & 18 Vict. c. 97), ss. 15—20; Commonable Rights Compensation Act, 1882 (45 & 46 Vict. c. 15). This matter is dealt with *in extenso* under title COMMONS, Vol. IV., p. 441. For forms of application see Encyclopædia of Forms, Vol. VIII., pp. 120, 123, 124.

(*t*) *Nash* v. *Combs* (1868), L. R. 6 Eq. 51; and see *Fox* v. *Amhurst* (1875), L. R. 20 Eq. 403; *Austin* v. *Amhurst* (1877), 7 Ch. D. 689; *Ex parte Lincoln Corporation* (1852), 21 L. J. (CH.) 621; *A.-G.* v. *Meyrick*, [1893] A. C. 1; *Simcoe* v. *Pethick*, [1898] 2 Q. B. 555. As to the costs allowed to the commoners, see *Waterton* v. *Burt* (1870), 39 L. J. (CH.) 425; and see title COMMONS, Vol. IV., p. 441.

(*u*) *Richards* v. *De Winton*, *Richards* v. *Evans*, [1901] 2 Ch. 566; but see on appeal [1903] 1 Ch. 507, C. A. Compare *Weatherley* v. *Layton*, [1892] W. N. 165, and cases cited in last note.

(*a*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 64, 76, 107.

(*b*) *Ibid.*, s. 77. For form of deed poll, see Encyclopædia of Forms, Vol. VIII., p. 118.

SECT. 3. Common or Waste Lands.

or deposited will vest in the promoters of the undertaking, freed and discharged from all commonable or other rights, and they are entitled to immediate possession thereof (*c*).

Payment of money deposited in bank.

196. Upon application to the Chancery Division of the High Court that court may order the money so deposited to be paid to a committee appointed as aforesaid, or may make such other order in respect thereto for the benefit of the parties interested as the court shall think fit (*c*).

SECT. 4.—*Lands subject to Mortgage.*

SUB-SECT. 1.—*Redemption of Mortgage.*

Mortgaged land.

197. When promoters desire to acquire land which is subject to a mortgage, it is a common practice, when the mortgagee is not in possession, for them to treat with the owner of the equity of redemption for the full value of the land, and to leave him to pay off or otherwise discharge the mortgage out of the purchase-money. They are entitled so to proceed, but unless the mortgagee agrees to this procedure, they must take care that his interest is provided for, as otherwise they may be restrained from prosecuting their works on the mortgaged land until the mortgage has been redeemed (*d*). The mortgagee as well as the mortgagor is entitled to a notice to treat if there is no agreement between the parties (*e*). If a lump sum is paid into court in respect of both interests, the court will apportion the amount between the mortgagor and mortgagee (*f*).

Interest of the mortgagee.

198. The Lands Clauses Acts contain special provisions for the purchase or redemption of the mortgagee's interest by the promoters independently of the mortgagor (*g*). The promoters are authorised to purchase or redeem such interest, whether they have previously purchased the equity of redemption or not, and whether the mortgagee is entitled thereto in his own right or in trust for any other party, and whether he is in possession of the lands by virtue of his mortgage or not, and whether such mortgage affects such lands solely or jointly with any other lands not required for the purposes of the special Act (*h*).

Redemption by promoters.

199. If the time limited in the mortgage deed for payment of the principal has expired (*i*), the promoters may redeem the mortgage by paying or tendering to the mortgagee the principal and

(*c*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 107.

(*d*) *Ranken* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1849), 12 Beav. 298; *Spencer-Bell* to *London and South Western Rail. Co. and Metropolitan District Rail. Co.* (1885), 33 W. R. 771; and see *re Eastern Counties Rail Co., Ex parte Peyton's Settlement* (1856), 4 W. R. 380.

(*e*) *Martin* v. *London, Chatham, and Dover Rail. Co.* (1866), 1 Ch. App. 501; *R.* v. *Metropolitan Rail. Co.* (1865), 13 L. T. 444.

(*f*) *Pile* v. *Pile, Ex parte Lambton* (1876), 3 Ch. D. 36, C. A.; *Cooper* v. *Metropolitan Board of Works* (1883), 25 Ch. D. 472, C. A.; and see *Re South City Market Co., Ex parte Bergin* (1884), 13 L. R. Ir. 245.

(*g*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 108—114.

(*h*) *Ibid.*, s. 108.

(*i*) *Ibid.*, s. 114.

SECT. 4. Lands subject to Mortgage.

interest due on such mortgage, together with his costs and charges, if any, and also six months' additional interest, and thereupon the mortgagee is required immediately to convey his interest in the lands comprised in such mortgage to the promoters or as they shall direct, or the promoters may give notice in writing to the mortgagee that they will pay off the principal and interest due on such mortgage at the end of six months, computed from the day of giving such notice. If they give any such notice, or if the party entitled to the equity of redemption gives six months' notice of his intention to redeem the same, then at the expiration of either of such notices, or at any intermediate period, upon payment or tender by the promoters to the mortgagee of the principal money due on such mortgage and the interest which would have become due at the end of six months from the time of giving either of such notices, together with his costs and expenses, if any, the mortgagee must convey or release his interest in the lands comprised in such mortgage to the promoters or as they shall direct (*k*).

Failure of mortgagee to convey.

200. In either of these cases, if, upon such payment or tender, the mortgagee fails to convey or release his interest in such mortgage as directed by the promoters, or if he fails to adduce a good title thereto to their satisfaction, then the promoters may deposit in the Bank of England in the manner provided in like cases (*l*), the principal and interest, together with the costs, if any, due on such mortgage, and also, if such payment be made before the expiration of six months' notice as aforesaid, such further interest as would at that time become due; and they may, if they think fit, execute a deed poll duly stamped in the manner provided in the case of the purchase of lands (*m*), and thereupon as well as upon such conveyance by the mortgagee, if any such be made, all the estate and interest of the mortgagee and of all persons in trust for him, or for whom he may be a trustee, in the lands vests in the promoters, and they become entitled to immediate possession, provided the mortgagee was himself entitled to such possession (*n*).

SUB-SECT. 2.—*Lands of less Value than Mortgage Debt.*

Where mortgage debt exceeds value of land.

201. Where the mortgaged lands are of less value than the principal, interest, and costs secured thereon, the value of such lands, or the compensation in respect thereof, may be settled by agreement between the mortgagee and the party entitled to the equity of redemption thereof on the one part and the promoters on the other, but if they fail to agree as to the amount it will be determined as in other cases of disputed compensation (*o*). The amount of such value or compensation being so agreed upon or determined, must be paid by the promoters to the mortgagee, in satisfaction of his mortgage debt, so far as the same extends, and upon payment or tender thereof the mortgagee must convey

(*k*) Lands Clauses Consolidion Act, 1845 (8 & 9 Vict. c. 18), s. 108.
(*l*) *Ibid.*, s. 76, and p. 107, *ante*.
(*m*) *Ibid.*, s. 77, and p. 108, *ante*.
(*n*) *Ibid.*, s. 109.
(*o*) P. 69 *ante*.

SECT. 4.
Lands subject to Mortgage.

or release all his interest in such mortgaged lands to the promoters, or as they shall direct (*p*).

Discharge of lands.

202. If, upon such payment or tender being made, the mortgagee fails so to convey his interest in such mortgage or to adduce a good title thereto to the satisfaction of the promoters, they may deposit the amount of such value or compensation in the Bank of England in the manner provided in like cases (*q*). Every such payment or deposit must be accepted by the mortgagee in satisfaction of his mortgage debt so far as the same will extend, and operates as a full discharge of the mortgaged lands from all moneys due thereon; and the promoters may, if they think fit, execute a deed poll duly stamped in the manner provided in the case of the purchase of lands by them (*r*); and thereupon such lands as to all such estate and interest as is then vested in the mortgagee or any person in trust for him become absolutely vested in the promoters, and they are entitled to immediate possession thereof, provided such mortgagee was so entitled; but all rights and remedies possessed by the mortgagee against the mortgagor by virtue of any bond or covenant or other obligation, other than the right to such lands, will remain in force in respect of so much of the mortgage debt as is not satisfied by such payment or deposit (*s*)

Promoters dealing with mortgagor.

203. If the promoters deal with the mortgagor only, in respect of the interest both of himself and the mortgagee, and the amount assessed is less than the sum due in respect of the mortgage, the promoters, if they have entered and destroyed the buildings on the land, may be treated as in the same position as the mortgagor, and be ordered to pay the total amount found due in respect of the principal, interest, and costs (*t*).

SUB-SECT. 3.—*Part of Mortgaged Land taken.*

When part of mortgaged land taken.

204. When a part only of mortgaged lands is required, if such part is of less value than the principal money, interest, and costs secured on such lands, and the mortgagee does not consider the remaining part of such lands a sufficient security for the money charged thereon, or is not willing to release the part so required, then the value of such part and also the compensation, if any, to be paid in respect of the severance thereof or otherwise, may be settled by agreement between the mortgagee and the party entitled to the equity of redemption on the one part and the promoters on the other; and if they fail to agree as to the amount, it will be determined as in other cases of disputed compensation (*u*).

Mortgagee to release land.

The amount so agreed or determined is to be paid by the promoters

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 110.
(*q*) *Ibid.*, s. 109.
(*r*) *Ibid.*, s. 77, and p. 108 *ante*.
(*s*) *Ibid.*, s. 111
(*t*) *Martin* v. *London, Chatham, and Dover Rail. Co.* (1866), 1 Ch. App. 501. As to cases of entry where they have not known of the existence of a mortgage, see p. 151, *post*.
(*u*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 112; and see p. 69, *ante*.

SECT. 4. Lands subject to Mortgage.

to the mortgagee in satisfaction of his mortgage debt, so far as the same will extend, and thereupon the mortgagee must convey or release to them, or as they shall direct, all his interest in such mortgaged lands the value whereof shall have been so paid; and a memorandum of what has been so paid must be indorsed on the deed creating the mortgage and signed by the mortgagee, and a copy thereof must at the same time, if required, be furnished by the promoters at their expense to the party entitled to the equity of redemption of such lands (*x*).

Failure of mortgagee to release.

205. If upon payment or tender to any such mortgagee of the amount so agreed or determined he fails to convey or release to the promoters, or as they shall direct, his interest in the lands in respect of which the compensation has been paid or tendered, or if he fails to adduce a good title thereto, the promoters may, as in other like cases, deposit the money in the Bank of England (*a*). Such payment or deposit must be accepted by the mortgagee in satisfaction of his mortgage debt so far as the same extends, and is a full discharge of the portion of the mortgaged lands from all money due thereon.

The promoters may also, if they think fit, execute a deed poll duly stamped in the manner provided in the case of purchase of lands by them (*b*), and thereupon the lands become absolutely vested in them as to all such estate and interest as are then vested in the mortgagee or in any person in trust for him, and they will be entitled to immediate possession thereof, provided the mortgagee was so entitled (*c*).

Remedies of mortgagee.

Every such mortgagee has, however, the same powers and remedies for recovering and compelling payment of the mortgage money or the residue thereof, as the case may be, and the interest thereof respectively, upon and out of the residue of such mortgaged lands, or the portion thereof not required by the promoters, as he would otherwise have had or been entitled to for recovering or compelling payment thereof upon or out of the whole of the lands originally comprised in the mortgage (*c*).

SUB-SECT. 4.—*Payment before Time limited in Mortgage Deed.*

Costs of reinvestment.

206. In all of the above cases, if in the mortgage deed a time has been limited for payment of the principal money thereby secured, and if, under the above provisions, the mortgagee is required to accept payment of his mortgage money or of part thereof at a time earlier than the time so limited, the promoters must pay to him, in addition to the sum which is so paid off, all costs and expenses properly incurred by him in respect of, or which shall be incidental to the reinvestment of, the sum so paid off (*d*). Such costs in case of difference are to be taxed, and payment thereof may be enforced in the manner provided with respect to the costs of conveyances (*e*).

(*x*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 112; and see p. 142, *ante*.
(*a*) *Ibid.*, s. 76, and p. 107, *ante*.
(*b*) *Ibid.*, s. 77, and p. 108, *ante*.
(*c*) *Ibid.*, s. 113.
(*d*) *Ibid.*, s. 114.
(*e*) *Ibid.*, s. 83, and p. 112, *ante*.

SECT. 4. Lands subject to Mortgage.

Loss of interest.

207. If the rate of interest secured by the mortgage is higher than at the time of the same being so paid off can reasonably be expected to be obtained on reinvesting the money, regard being had to the then current rate of interest, the mortgagee is further entitled to receive from the promoters, in addition to the principal and interest, compensation in respect of the loss to be sustained by him by reason of his mortgage money being so prematurely paid off, the amount of such compensation to be ascertained, in case of difference, as in other cases of disputed compensation.

Until payment or tender of such compensation the promoters are not entitled, as against such mortgagee, to possession of the mortgaged lands under the provisions above set out (*f*), and if they enter, on payment into the Bank of the compensation for the land in the name of the mortgagor only, they may be restrained from proceeding with their works until the compensation for the mortgagee's interest has been ascertained and paid or secured (*g*).

SECT. 5.—*Lands charged with Rents etc.*

Rent-charges etc.

208. Differences between the promoters and persons entitled to any rent service, rent-charge, chief or other rent, or other payment or incumbrance not otherwise provided for, upon the lands required to be taken, in regard to the consideration to be paid for the release of such lands therefrom, or from the portion thereof affecting the lands required, are determined as in other cases of disputed compensation (*h*).

Apportionment.

209. If part only of the lands so charged be required, the apportionment of any such charge may be settled by agreement between the party entitled to such charge and the owner of the lands on the one part and the promoters on the other, and if such apportionment is not so settled by agreement, it must be settled by two justices. If the remaining part of the lands so jointly subject be a sufficient security for the charge, the party entitled to the charge may, with the consent of the owner of the lands so jointly subject, release therefrom the lands required on condition or in consideration of such other lands remaining exclusively subject to the whole charge (*i*).

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 114.

(*g*) *Ranken* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1849), 12 Beav. 298.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 115. The purchase of a Government annuity of a like amount to a life rent-charge has been sanctioned by the court in the case of a lunatic (*Re Brewer* (1875), 1 Ch. D. 409, C. A.). By the Tithe Act, 1878 (41 & 42 Vict. c. 42), extended by the Tithe Rent-charge Redemption Act, 1885 (48 & 49 Vict. c. 32), s. 2, when land taken for certain public purposes—educational, ecclesiastical, and sanitary—is charged with rent-charge or other payment in lieu of tithes, the same is to be redeemed for a sum of money equal to twenty-five times the amount thereof. See title ECCLESIASTICAL LAW. As to questions relating to tithes under special Acts, see *R.* v. *Nene Outfall Commissioners* (1829), 9 B. & C. 875; *Esdaile* v. *Metropolitan and District Rail. Cos.' Joint Committee* (1881), 46 J. P. 103; *London and Blackwall Rail. Co.* v. *John Letts* (1851), 3 H. L. Cas. 470.

(*i*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 116. For an example of the remaining lands being wholly charged by order of court, see

SECT. 5. Lands charged with rents etc.

Release of lands.

210. Upon payment or tender of the compensation so agreed or determined to the party entitled to the charge, he is required to execute a release of such charge to the promoters (*j*). If he fails to do so, or if he fails to adduce a good title to the charge to the satisfaction of the promoters, they may deposit the amount of the compensation in the Bank of England, as in like cases (*k*), and also, if they think fit, they may execute a deed poll duly stamped in the manner provided in the case of purchase of lands by them (*l*), and thereupon the charge, or the portion thereof in respect whereof the compensation has been so paid, ceases and is extinguished (*j*).

Effect of release.

211. If any lands be so released from any such charge, incumbrance, or portion thereof, to which they were subject jointly with other lands, such last-mentioned lands alone become charged with the whole of such charge or with the remainder thereof, as the case may be, and the party entitled to the charge has all the same rights and remedies over such last-mentioned lands for the whole or the remainder of the charge, as the case may be, as he had previously over the whole of the lands subject to the charge (*m*).

Memorandum of lease.

212. Upon any such charge or portion of charge being so released, the deed or instrument creating or transferring such charge may be tendered to the promoters, and they or two of them are required to subscribe, or, if they be a corporation, to affix their common seal to, a memorandum of such release indorsed on such deed or instrument, declaring what part of such lands originally subject to such charge has been purchased under the special Act, and, if the lands be released from part of such charge, what proportion of such charge has been released, and how much continues payable, or if the lands so required have been released from the whole charge, then that the remaining lands are thenceforward to remain exclusively charged therewith. Such memorandum is to be made and executed at the expense of the promoters, and is evidence in all courts and elsewhere of the facts therein stated, but not so as to exclude any other evidence of the same facts (*m*).

SECT. 6.—*Lands subject to Leases.*

SUB-SECT. 1.—*Part of Land taken.*

Apportionment of rent under lease.

213. When lands are comprised in a lease for an unexpired term of years, and part only of such lands is required for the purposes of the special Act, the rent payable in respect of the lands comprised in the lease must be apportioned between the lands so required and the residue of such lands. Such apportionment may be settled by agreement between the lessor and lessee on the one part and the

Powell v. *South Wales Rail. Co.* (1855), 1 Jur. (N. S.) 773. For form of agreement for apportionment of rent-charge, see Encyclopædia of Forms, Vol. VIII., p. 85.

(*j*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 117.
(*k*) *Ibid.*, s. 76. See p. 107, *ante*.
(*l*) *Ibid.*, s. 77. See p. 108, *ante*.
(*m*) *Ibid.*, s. 118.

SECT. 6. Lands subject to Leases.

promoters on the other part; and if not so agreed, it must be settled by two justices (*n*).

If the promoters agree with the lessee as to the apportionment, specific performance of an agreement to purchase the lease may be decreed, although the consent of the lessor to the apportionment has not been obtained (*o*).

The lessee cannot compel the lessor to accept the apportionment, and in a case of difference between them the promoters must initiate proceedings before the justices (*p*). The costs of the apportionment are not costs of the conveyance, and, therefore, are not payable as such by the promoters (*q*).

Effect of apportionment.

214. After the apportionment, the lessee, as to all future accruing rent, is liable only to so much as shall be so apportioned in respect of the lands not required for the purposes of the special Act. As to the lands not so required and as against the lessee, the lessor has all the same rights and remedies for the recovery of such portion of rent as previously to such apportionment he had for the recovery of the whole rent reserved by the lease; and all the covenants, conditions, and agreements of the lease, except as to the amount of rent to be paid, remain in force with regard to that part of the land not required for the purposes of the special Act in the same manner as they would have done in case such part only of the land had been included in the lease (*r*).

Compensation to lessee.

215. Every such lessee is entitled to receive from the promoters compensation for the damage done to him in his tenancy by reason of the severance of the lands required from those not required, or otherwise by reason of the execution of the works (*s*).

SUB-SECT. 2.—*Yearly Tenancies and Lesser Interests.*

Short tenancies.

216. When promoters require to purchase or take lands in the possession of persons holding under short tenancies, they may proceed, so far as regards the tenants, in various ways. They may

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 119. An arbitrator or jury have no authority to apportion the rent under this Act (*Re Ware and Regent's Canal Co.* (1854), 7 Ry. & Can. Cas. 780). Provisions authorising an arbitrator to apportion rents are to be found in particular Acts, *e.g.*, Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 20, Sched. II. (11).

(*o*) *Slipper* v. *Tottenham and Hampstead Junction Rail. Co.* (1867), L. R. 4 Eq. 112; *Williams* v. *East London Rail. Co.* (1869), 18 W. R. 159. For form of assignment of part of leasehold premises at an apportioned rent, see Encyclopædia of Forms, Vol. VIII., p. 108.

(*p*) *Slipper* v. *Tottenham and Hampstead Junction Rail. Co., supra, per* ROMILLY, M.R., at p. 115. It would seem to follow that the lessee and lessor together might take the promoters before justices to have the rent apportioned.

(*q*) *Re Hampstead Junction Rail. Co., Ex parte Buck* (1863), 33 L. J. (CH.) 79. As to the payment of such costs out of money deposited in the Bank under s. 85, see *Re London, Brighton, and South Coast Rail. Co., Ex parte Flower* (1866), 1 Ch. App. 599.

(*r*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 119 (as to time when apportioned rent becomes payable where delay in entry, see *Ball* v. *Graves* (1886), 18 L. R. Ir. 224; *Re Secretary of State for War and Hurley's Contract*, [1904] 1 I. R. 354).

(*s*) *Ibid.*, s. 120; and see p. 31, *ante*, as to principles of compensation.

induce the lessor to determine the tenancy by notice in the usual way, or they may purchase the lessor's interest and determine the tenancy themselves by notice. In neither of these cases is the tenant entitled to any compensation, so long as he is allowed to remain in possession until the notice expires (*a*). Further, they may serve a notice to treat upon the tenant, if they have the necessary compulsory powers, whereupon the tenant will be entitled to compensation in respect of his interest at the date of the notice to treat (*b*), and even if he is allowed to remain in possession to the end of his tenancy, he will, nevertheless, be entitled to some compensation by reason of his position being altered by such service (*c*). The promoters may also obtain possession of the premises by deposit of security and the giving of a bond, as in any other cases where entry is required before the purchase is completed (*d*).

Compensation for unexpired term.

217. A further method of obtaining possession of land subject to leases, before the expiration of the tenancies, is provided in the Lands Clauses Consolidation Act, 1845, in cases where the person in possession has no greater interest therein than as tenant for a year or from year to year (*e*). This is in the nature of a proviso to the general provisions of the Act (*f*). If such a person is required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he is entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or, if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same (*g*). The amount

(*a*) *Ex parte Nadin* (1848), 17 L. J. (CH.) 421; *Syers* v. *Metropolitan Board of Works* (1877), 36 L. T. 277, C. A.; and see *Re Portsmouth Rail. Co., Ex parte Merrett* (1860), 2 L. T. 471. As to tenants of mortgaged premises, reference may be made to *Zick* v. *London United Tramways, Ltd.*, [1908] 2 K. B. 126, C. A.

(*b*) *Tyson* v. *London Corporation* (1871), L. R. 7 C. P. 18, *per* WILLES, J., at pp. 22, 23. In this case a six months' notice of intention to take was served, which notice has the same effect as a notice to treat (*Morgan* v. *Metropolitan Rail. Co.* (1868), L. R. 3 C. P. 553; L. R. 4 C. P. 97, Ex. Ch.). As to the effect of such a notice, see *Birch* v. *St. Marylebone (Vestry)* (1869), 20 L. T. 697. See p. 66, *ante*.

(*c*) *Cranwell* v. *London Corporation* (1870), L. R. 5 Exch. 284, at p. 287, Ex. Ch.; *R.* v. *Rochdale Improvement Act Commissioners* (1856), 2 Jur. (N. S.) 861; and compare *R.* v. *London and Southampton Rail. Co.* (1839), 10 Ad. & El. 3. For form of agreement with tenant, see Encyclopædia of Forms, Vol. VIII., p. 87.

(*d*) As to such entry, see p. 99, *ante*. It has been held that if, after service of a notice to treat and before entry, a tenant's interest is reduced to one of less than one year, a magistrate has jurisdiction to assess the compensation under s. 121 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18) (*R.* v. *Kennedy*, [1893] 1 Q. B. 533), but in *Bexley Heath Rail. Co.* v. *North*, [1894] 2 Q. B. 579, C. A., which related to the same land, the Court of Appeal suggested that the claimant in the earlier case ought to have appealed. Compare *R.* v. *Great Northern Rail. Co.* (1876), 2 Q. B. D. 151.

(*e*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121.

(*f*) *R.* v. *London Corporation* (1867), L. R. 2 Q. B. 292.

(*g*) This includes every kind of loss the tenant can suffer (*R.* v. *Great Northern Rail. Co., supra, per* LUSH, J., at p. 156; *e.g.*, see *R.* v. *Vaughan* (1868), L. R. 4 Q. B. 190).

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Lands subject to Leases.

of compensation is to be determined by two justices in case the parties differ (*h*).

Possession must be required.

In order that this procedure to assess the compensation may be applicable, the person must be in fact required to give up possession before the expiration of his term. The service of a notice to treat is not in itself such a requiring of possession (*i*), nor is it constituted such by the going out of possession on receipt of such a notice (*k*), but a person who gives up possession by agreement with the promoters falls within the provision (*l*). A person in possession as the owner of the residue of a long term, but of which less than a year remains, is a person falling under this provision (*m*), but persons having equitable interests for a longer period than a year do not fall within it (*n*).

Production of lease.

If any party having a greater interest than as tenant at will claims compensation in respect of any unexpired term or interest under any lease or grant of any such lands, the promoters may require such party to produce the lease or grant in respect of which such claim is made or the best evidence thereof in his power; and if, after demand made in writing by the promoters, such lease or grant or such best evidence thereof is not produced within twenty-one days, the party so claiming compensation is to be considered as a tenant holding only from year to year, and will be entitled to compensation accordingly (*o*).

Delivery of possession.

218. Upon payment or tender of the amount of such compensation, all persons who have been so required to deliver up possession as having interests not greater than that of a tenant for a year or from year to year, must respectively deliver up to the promoters or to the person appointed by them to take possession thereof any such lands in their possession required for the purposes of the special Act (*p*). If this procedure is followed, no conveyance and no notice to treat would appear to be necessary in order to enable the promoters to acquire the tenant's interest (*q*).

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121. For procedure before justices, see s. 24, and p. 77, *ante*. If no notice to treat has been served, or, if served, is not treated as subsisting, the compensation would be assessable by the justices as at the date of entry or when possession is required (*R.* v. *Great Northern Rail. Co.* (1876), 2 Q. B. D. 151, at p. 155; *Bexley Heath Rail. Co.* v. *North*, [1894] 2 Q. B. 579).

(*i*) *R.* v. *Stone* (1866), L. R. 1 Q. B. 529; *R.* v. *London and Southampton Rail. Co.* (1839), 10 Ad. & El. 3.

(*k*) *Great Northern and City Rail. Co.* v. *Tillett*, [1902] 1 K. B. 876. Neither is this procedure applicable for mere injurious affection (*R.* v. *Middlesex (Sheriff)* (1862), 10 W. R. 717).

(*l*) *Knapp* v. *London, Chatham, and Dover Rail. Co.* (1863), 32 L. J. (EX.) 236.

(*m*) *R.* v. *Great Northern Rail. Co.*, *supra*.

(*n*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 122.

(*o*) *E.g.*, *R.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1854), 4 E. & B. 88; *Sweetman* v. *Metropolitan Rail. Co.* (1864), 1 Hem. & M. 543; *R.* v. *East London Rail. Co.* (1867), 17 L. T. 291; *R.* v. *Liverpool and Manchester Rail. Co.* (1836), 4 Ad. & El. 650.

(*p*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 121.

(*q*) *Syers* v. *Metropolitan Board of Works* (1877), 36 L. T. 277, *per* JESSEL, M.R., at p. 278, C. A.

SECT. 7.—*Lands or Interest the Purchase of which has been omitted by Mistake.*

SECT. 7. Lands or Interest the Purchase of which has been omitted by Mistake.

Omitted interests.

219. If at any time after the promoters have entered upon any lands which by the special and incorporated Acts they were authorised to purchase, and which are permanentlly required for the purposes of the special Act, any person appears to be entitled to any estate, right, or interest in, or charge affecting, such lands, which the promoters have through mistake or inadvertence failed or omitted to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands has expired or not, the promoters are entitled to remain in the undisturbed possession of such lands, provided compensation is made within the time and in the manner hereinafter mentioned (*r*). Thus, if after the purchase and taking of land from an ostensible owner the promoters become aware of the existence of a mortgage which they do not dispute, the mortgagee cannot eject them until the time has expired in which they may make compensation (*s*), nor can an owner do so if, by reason of a mistake in the book of reference, they have taken more land than was shown by the admeasurements in such book (*t*).

If the promoters dispute the existence of the right or interest, an action of ejectment may, however, be brought against them by the claimant in order to establish his right, but in such a case execution will be postponed for the same period (*a*). If, however, the promoters become aware of the existence of the right or interest before they enter permanently, previous mistakes or ignorance will not bring them within the above provision, and they may be liable to actions of ejectment or trespass and be restrained by injunction (*b*).

Payment of compensation.

220. The condition entitling the promoters to remain in possession of the land is that within six months after notice of such estate, right, interest, or charge, in case the same is not disputed by them, or in case it is disputed then within six months after the same has been finally established by law in favour of the claimant (*c*), they must purchase or pay compensation for the same,

(*r*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 124.

(*s*) *Jolly* v. *Wimbledon and Dorking Rail. Co.* (1861), 31 L. J. (Q. B.) 95, Ex. Ch.

(*t*) *Hyde* v. *Manchester Corporation* (1852), 5 De G. & Sm. 249; *Kemp* v. *West End and Crystal Palace Rail. Co.* (1855), 1 K. & J. 681. Compare *Omagh Urban Council* v. *Henderson*, [1907] 2 I. R. 310.

(*a*) *Salisbury (Marquis)* v. *Great Northern Rail. Co.* (1858), 5 C. B. (N. S.) 174; *Doe* d. *Hyde* v. *Manchester Corporation* (1852), 12 C. B. 474.

(*b*) *Martin* v. *London, Chatham, and Dover Rail. Co.* (1866), 1 Ch. App. 501; *Stretton* v. *Great Western and Brentford Rail. Co.* (1870), 5 Ch. App. 751; *Thomas* v. *Barry Dock and Rail. Co.* (1889), 5 T. L. R. 360; *Cardwell* v. *Midland Rail. Co.* (1904), 21 T. L. R. 22, C. A. As to the principles on which the courts act in granting injunctions in these cases, see *Wood* v. *Charing Cross Rail. Co.* (1866), 33 Beav. 290; *Garrett* v. *Banstead and Epsom Downs Rail. Co.* (1864), 13 W. R. 878, C. A.; *Munro* v. *Wivenhoe and Brightlingsea Rail. Co.* (1865), 13 W. R. 880, C. A.; *Webster* v. *South Eastern Rail. Co.* (1851), 1 Sim. (N. S.) 272; *Lind* v. *Isle of Wight Ferry Co.* (1862), 1 New Rep. 13.

(*c*) Thus, if an action of ejectment is brought, and application is made for a new trial, the matter is not finally determined until such new trial is refused (*Hyde* v. *Manchester Corporation* (1852), 5 De G. & Sm. 249). For a case in regard to a dispute

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and must also pay to such party, or to any other party who may establish a right thereto, full compensation for the mesne profits or interest which would have accrued to such parties respectively in respect thereof during the interval between the entry of the promoters thereon and the time of the payment of such purchase-money or compensation, so far as such mesne profits or interest may be recoverable in law or equity (*d*).

Ascertainment of compensation.

221. The purchase-money or compensation is to be agreed on, or awarded and paid, in like manner as, according to the provisions of the Lands Clauses Acts, the same respectively would have been agreed on or awarded and paid if the promoters had purchased such estate, right, interest, or charge before their entering upon such land, or as near thereto as circumstances will admit (*d*). In estimating such compensation both in respect of the lands or of any estate or interest in the same and for any mesne profits, the jury, or arbitrators, or justices, as the case may be, are required to assess the same according to what they shall find to have been the value of such lands, estate, or interest, and profits, at the time such lands were entered upon by the promoters, and without regard to any improvements or works made in the said lands by the promoters, and as though the works had not been constructed (*e*).

Costs of determining rights.

222. When the right to any such estate, interest, or charge has been disputed by the promoters and determined in favour of the claimant, the promoters before they become absolutely entitled to any such estate, interest, or charge, or to have the same merged or extinguished for their benefit, must pay, in addition to the purchase-money, compensation, or satisfaction, the full costs and expenses—that is, as between solicitor and client (*f*)—of any proceedings at law or in equity for the determination or recovery of the same to the parties with whom any such litigation in respect thereof shall have taken place (*g*). Such costs and expenses, if disputed, are required to be settled by the proper officer of the court in which such litigation took place (*h*).

as to minerals decided after many years, see *Caledonian Rail. Co.* v. *Davidson*, [1903] A. C. 22.

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 124.

(*e*) *Ibid.*, s. 125. As to the measure of damages when the promoters have entered with notice of the interest, see *Stretton* v. *Great Western and Brentford Rail. Co.* (1870), 5 Ch. App. 751. As to tender of amends, see s. 135.

(*f*) *Doe* d. *Hyde* v. *Manchester Corporation* (1852), 12 C. B. 474; and see *Caledonian Rail. Co.* v. *Davidson*, [1903] A. C. 22, at pp. 35—38.

(*g*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 126.

(*h*) *Ibid.*; and see order of House of Lords in *Caledonian Rail. Co.* v. *Davidson*, *supra*, at p. 36.

Part XIV.—Special Provisions as to Compensation in Public General Statutes.

SECT. 1.—*Commercial Undertakings.*

SUB-SECT. 1.—*Railways.*

SECT. 1. Commercial Undertakings.

Special provisions as to railways

223. In special Acts passed after the 8th May, 1845, authorising the construction of railways, the Railways Clauses Consolidation Act, 1845 (*i*), is incorporated, unless expressly varied or excepted (*k*). In constructing the railway so authorised and in taking lands for that purpose, the railway company is subject to the provisions and restrictions of the Lands Clauses Acts, and is required to make to all the parties interested in the lands taken or used or injuriously affected full compensation, which is to be determined and recovered according to the provisions of those Acts (*l*). A railway company is also given power to execute certain works necessary to construct the railway, and for the making, maintaining, altering, repairing, and using it, but in exercising these powers it must do as little damage as can be, and make full satisfaction to all parties interested for all damage sustained by them in consequence (*m*).

Provision is also made for the temporary occupation of lands and private roads near the railway during the construction thereof, and for the payment of full compensation to the owners and occupiers for the damage they may suffer, the amount of which is to be assessed in the manner provided in the Lands Clauses Acts (*n*).

Accommodation works.

224. The railway company is also required to make certain works for the accommodation of lands adjoining the railway (*o*). Differences in respect of these are to be determined by two justices (*p*). If an owner accepts compensation in lieu of accommodation works, he cannot afterwards require the railway company

(*i*) 8 & 9 Vict. c. 20.

(*k*) *Ibid.*, s. 1. See this subject discussed fully under title RAILWAYS AND CANALS. When railways are authorised under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), the compulsory powers of the Lands Clauses Acts and the Railways Clauses Acts are not incorporated. See ss. 3, 23, 31.

(*l*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 6.

(*m*) *Ibid.*, s. 16; and see s. 21 as to compensation for damage to gas and water pipes. As to the right to injuriously affect lands in making alterations subsequent to the construction of the railway, see *Emsley* v. *North Eastern Rail. Co.*, [1896] 1 Ch. 418, C. A.; and title NUISANCE.

(*n*) *Ibid.*, ss. 30—44. For form of notice by railway company requiring possession of land for temporary purposes, see Encyclopædia of Forms, Vol. VIII., p. 74.

(*o*) *Ibid.*, ss. 68—75.

(*p*) *Ibid.*, s. 69. Tribunals assessing compensation have no power to order such works or to award any sum in respect of them, unless by agreement between the parties (*R.* v. *South Wales Rail. Co.* (1849), 13 Q. B. 988), but in assessing compensation they ought to take into account the obligation of the company to make the necessary accommodation works, if required; but they must bear in mind that the obligation is limited to the present, and not to the prospective, use of the land (*R.* v. *Brown* (1867), L. R. 2 Q. B. 630). Agreements to make accommodation works may be enforced by specific performance or damages (*Fortescue* v. *Lostwithiel and Fowey Rail. Co.*, [1894] 3 Ch. 621; *Greene* v. *West Cheshire Rail. Co.* (1871), L. R. 13 Eq. 44; *Jersey (Earl)* v. *Great Western Rail. Co.*, [1894] 3 Ch. 625,n., C. A.; and see *Pollock* v. *North British Rail. Co.* (1901), 3 F. (Ct. of Sess.) 727). As to taking land for other works, see p. 24, *ante*.

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to construct such works (*q*), nor can he construct them himself (*r*). There are also special provisions in respect of the mines lying under or near the railway (*s*).

Variations in procedure.

225. Variations of the procedure under the Lands Clauses Acts are contained in the Railway Companies Act, 1867 (*t*), and the Regulation of Railways Act, 1868 (*a*). Under the former Act provision is made for the appointment of the surveyor by the Board of Trade instead of by two justices when the railway company desire to enter before purchase (*b*). Under the latter Act the parties may have a question of disputed compensation determined by a judge and jury in the High Court (*c*).

Extension of time.

226. When the time limited by the special Act for the exercise of the powers of compulsory purchase of lands or of the powers for construction of the railway and works is extended, the tribunals which assess compensation are required to include the additional damage, if any, sustained by persons interested in the lands taken or injuriously affected by reason of the extension of time (*d*). Such extension does not affect contracts entered into or notices given by the company before the passing of the extension Act (*e*). Provision is also made for the completion of contracts and works when railway companies are amalgamated (*f*).

Abandonment of undertaking.

227. When railways are abandoned a special Act is frequently passed making provision for the payment of compensation to owners whose land has been taken or injured (*g*). Protection to landowners in case an undertaking is not completed is also afforded by the parliamentary deposit, which may be applied by the High Court towards compensating them (*h*).

Light railways.

228. Orders authorising light railways, made under the Light

(*q*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68.

(*r*) *Rhondda and Swansea Rail. Co.* v. *Talbot*, [1897] 2 Ch. 131, C. A.

(*s*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77—85. The principles of compensation in respect of minerals under these sections are discussed at p. 49, *ante*.

(*t*) 30 & 31 Vict. c. 127.

(*a*) 31 & 32 Vict. c. 119.

(*b*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 36. This provision is dealt with fully in Part VIII., p. 100, *ante*. For forms, see Encyclopædia of Forms, Vol. VIII., pp. 45, 46.

(*c*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), ss. 41—44. These provisions are dealt with fully in Part VII., pp. 86 and 94, *ante*.

(*d*) Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 20.

(*e*) *Ibid.*, s. 21.

(*f*) *Ibid.*, ss. 45—47.

(*g*) Compare Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), amended by Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114). These do not appear to be applicable to railways incorporated since 1867. See *Re Uxbridge and Rickmansworth Rail. Co.* (1890), 43 Ch. D. 536, at p. 557, C. A.

(*h*) Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), which is applicable to all statutory undertakings. As to the construction of this Act, see *Re Potteries, Shrewsbury, and North Wales Rail. Co.* (1883), 25 Ch. D. 251, C. A.; *Re Ruthin and Cerrig-y-Druidion Railway Act* (1886), 32 Ch. D. 438, C. A.; *Re Uxbridge and Rickmansworth Rail. Co.* (1890), 43 Ch. D. 536, C. A.; *Ex parte Chambers*, [1893] 1 Ch. 47; *Re Hull Barnsley and West Riding Junction Rail. Co.*, [1893] W. N. 83; *Re Torrington and Okehampton Railway Bill*, [1907] 1 Ch. 186; and see title RAILWAYS AND CANALS.

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Railways Act, 1896 (*i*), may incorporate the Lands Clauses Acts; but, apart from the variations which may be made in any such order (*k*), it is provided that any matter which may be determined by the verdict of a jury, by arbitration, or by justices, shall for the purposes of the order be referred to and determined by a single arbitrator appointed by the parties or by the Board of Trade (*l*). The procedure is governed by the Arbitration Act, 1889 (*m*), and a special scale of costs has been fixed (*n*).

The arbitrator in determining the amount of compensation is required to have regard to the extent to which the remaining and contiguous lands and hereditaments belonging to the same proprietor may be benefited by the proposed light railway (*l*). The order may also authorise the payment to trustees, instead of into the Bank of England, of any purchase-money or compensation not exceeding £500 (*o*).

Prevention of accidents.

229. Powers are also conferred on railway companies to do acts in order to prevent and repair accidents (*p*), and to prevent the spread of fire from sparks emitted by locomotives (*q*), in which cases special provisions are made for the payment of compensation. Subject to a certificate of the Board of Trade, a railway company have also power to take additional land when necessary for the public safety (*r*).

Electrical works.

230. Provisional orders to be confirmed by Parliament may also be made by the Board of Trade authorising the compulsory acquisition of land for electrical works in order to introduce electrical power on railways (*s*).

SUB-SECT. 2.—*Waterworks* (*t*).

Waterworks Clauses Act.

231. Special Acts authorising the construction of waterworks passed after the 23rd April, 1847, may incorporate the Waterworks Clauses Act, 1847 (*a*), or some of the groups of clauses therein. They invariably do so when compulsory powers are

(*i*) 59 & 60 Vict. c. 48; and see title TRAMWAYS AND LIGHT RAILWAYS.
(*k*) *Ibid.*, s. 11.
(*l*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 13.
(*m*) 52 & 53 Vict. c. 49. See title ARBITRATION, Vol. I., p. 437.
(*n*) Light Railways (Costs) Rules, 1898. Costs are governed by the provisions of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), and are in the discretion of the arbitrator (*Baxter* v. *Midland Rail. Co.* (1905), 93 L. T. 538; and see *Re Baxters and Midland Rail. Co.* (1906), 95 L. T. 20, C. A.). The costs may be taxed by the arbitrator or by a master under the Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11), and there is no appeal from him (*Re Cannings and Middlesex County Council*, [1907] 1 K. B. 51, C. A.).
(*o*) Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 14.
(*p*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 14; Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 24.
(*q*) Railway Fires Act, 1905 (5 Edw. 7, c. 11).
(*r*) Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 15; and see title RAILWAYS AND CANALS.
(*s*) Railways (Electrical Power) Act, 1903 (3 Edw. 7, c. 30), s. 2. There is no express provision as to the incorporation of the Lands Clauses Acts in these orders.
(*t*) See title WATERWORKS for full treatment of this subject.
(*a*) 10 & 11 Vict. c. 17. When no compulsory powers of taking land are required, waterworks may be constructed under an order made pursuant to the Gas and Waterworks Facilities Act, 1870 (33 & 34 Vict. c. 70).

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required. When undertakers are empowered, by a special Act incorporating that Act, to take or use any lands or streams otherwise than by agreement for the purpose of constructing or supplying waterworks, they are subject to the provisions and restrictions of the Lands Clauses Acts, and are required to make full compensation to all the persons interested in lands or streams taken, used, or injuriously affected under the powers of the special Act (*b*). The amount of the compensation is determined and recovered under the Lands Clauses Acts, except where otherwise expressly provided (*b*).

Well-sinking etc.

The undertakers are also empowered to execute other works, such as sinking wells and diverting streams, but they must do as little damage as can be, and where possible provide other watering places, drains, and channels for the use of adjoining lands, and make full compensation to all parties interested for damage sustained by them (*c*). Accommodation works may be required by the special Act, in which case disputes in regard thereto are to be settled by two justices (*d*). There are special provisions dealing with mines (*e*).

SUB-SECT. 3.—*Gasworks* (*f*).

Gasworks Clauses Acts.

232. Neither the Gasworks Clauses Act, 1847 (*g*), nor the Gasworks Clauses Act, 1871 (*h*), contain provisions for the compulsory purchase of land (*i*). The former Act authorises the undertakers to break up the soil and pavement of streets and bridges for the purpose of laying pipes, but they must do as little damage as can be and make compensation for any damage done in the execution of their powers (*k*). There are no provisions in these Acts as to support from mines. In the absence of such provisions the undertakers are entitled to support for the pipes they are authorised to lay down, and the mine-owner will be entitled to compensation for the burden so imposed upon him (*l*).

(*b*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 6. The complete diversion of a stream is a taking and using of the stream; the entry on the bed and diverting part of the water is a taking of the lands and stream as regards the owner of the bed, but the diversion as regards the other riparian owners would be an injurious affection, and the compensation would be determined accordingly. See *Ferrand* v. *Bradford Corporation* (1856), 21 Beav. 412; *Bush* v. *Trowbridge Waterworks Co.* (1875), 10 Ch. App. 459; *Page* v. *Kettering Waterworks Co.* (1892), 8 T. L. R. 228; *Stone* v. *Yeovil Corporation* (1876), 2 C. P. D. 99, C. A. Special Acts frequently authorise compensation to be given in the form of compensation water.

(*c*) *Ibid.*, s. 12, and as to breaking up streets and laying pipes, see ss. 28 and 29. The abstraction of running silt by pumping may be an injurious affection and would entitle an owner injured thereby to compensation, although done subsequently to the construction of the works (*Fletcher* v. *Birkenhead Corporation*, [1907] 1 K. B. 205, C. A.). For another example of injurious affection, see *Redler* v. *Great Western Rail. Co.* (1907), 96 L. T. 98, H. L.

(*d*) *Ibid.*, ss. 16, 17.

(*e*) *Ibid.*, ss. 18—27. These are dealt with fully, p. 49, *ante*.

(*f*) See title GAS for full treatment of this subject.

(*g*) 10 & 11 Vict. c. 15.

(*h*) 34 & 35 Vict. c. 41.

(*i*) Neither does the Gas and Waterworks Facilities Act, 1870 (33 & 34 Vict. c. 70), but power to take land is frequently inserted in Gas Acts, in which cases the Lands Clauses Acts are incorporated.

(*k*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 6.

(*l*) *Normanton Gas Co.* v. *Pope and Pearson, Ltd.* (1883), 52 L. J. (Q. B.)

SUB-SECT. 4.—*Electric Lighting* (*m*). SECT. 1.

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233. No powers for the compulsory purchase or taking of lands are conferred by the general Acts relating to electric lighting (*n*). Promoters of such undertakings may be authorised by licence, provisional order, or special Act to break up streets and to carry out works for the construction of the undertaking, which may interfere with the rights of other persons (*o*). In the exercise of such powers, whether given under the Electric Lighting Acts of 1882—1888 (*n*), or under any licence, order, or special Act, the undertakers must cause as little detriment and inconvenience and do as little damage as may be, and must pay full compensation to persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation in case of difference to be determined by arbitration (*o*).

Electric Lighting Acts.

The works must also be carried out subject to certain requirements and restrictions, and if the undertakers make default in complying with these they become not only liable to penalties but must make full compensation to the owners affected thereby for any loss or damage which they may incur by reason thereof (*p*).

SUB-SECT. 5.—*Markets and Fairs.*

234. Special Acts passed after the 23rd April, 1847, authorising the construction of markets and fairs, may incorporate the Markets and Fairs Clauses Act, 1847 (*q*). If land is authorised by such special Act to be taken compulsorily, the provisions and restrictions of the Lands Clauses Acts are made applicable for the assessment and recovery of compensation (*r*). In exercising their powers the undertakers must do as little damage as can be and make full satisfaction to all parties interested for all damage sustained by reason of the exercise of such powers (*s*).

Markets and Fairs Clauses Act.

SUB-SECT. 6.—*Harbours, Docks and Piers.*

235. Special Acts passed after the 11th May, 1847, authorising the making and improving of harbours, docks and piers, may incorporate

Harbours etc. Clauses Act.

629, C. A. ; *Re Dudley Corporation* (1881), 8 Q. B. D. 86, C. A. When lighting works are constructed by local authorities the mining clauses of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), are now deemed to be incorporated by reason of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37). See p. 50, *ante*.

(*m*) See title ELECTRIC LIGHTING, TRACTION, AND POWER.

(*n*) These are Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), and Electric Lighting Act, 1888 (51 & 52 Vict. c. 12). They are read together as one Act. The clauses in the schedule to the Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), are incorporated in provisional orders and special Acts passed after 1st October, 1899, unless expressly varied or excepted (s. 1).

(*o*) Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 17. This provision relates to damage done in the execution of the works and not to that caused by their use (*Shelfer* v. *City of London Electric Lighting Co., Meux's Brewery Co.* v. *Same*, [1895] 1 Ch. 287, at p. 320, C. A.).

(*p*) Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), Sched., ss. 14 (f), 15 (h), 17 (k), 18 (5), 20 (3).

(*q*) 10 & 11 Vict. c. 14. See title MARKETS AND FAIRS.

(*r*) *Ibid.*, s. 6.

(*s*) *Ibid.*, s. 11.

SECT. 1. Commercial Undertakings.

the Harbours, Docks and Piers Clauses Act, 1847 (*t*). If compulsory powers of taking or interfering with land are conferred by such special Act, the Lands Clauses Acts are made applicable, and the persons interested in such lands are entitled to full compensation to be determined and recovered under those Acts (*a*).

SUB-SECT. 7.—*Cemeteries.*

Cemeteries Clauses Act.

236. Special Acts authorising the making of cemeteries passed after the 9th July, 1847, may incorporate the Cemeteries Clauses Act, 1847 (*b*). If the company are authorised, for the purpose of making the cemetery, to take or use lands without the consent of the owners and occupiers, the provisions of the Lands Clauses Acts are made applicable and the compensation will be ascertained and recovered under those Acts (*c*). In exercising the powers of the special Act the company must do as little damage as possible and must recompense the parties interested for all damage sustained by them through the exercise of such powers (*d*).

SECT. 2.—*Land required for Government Purposes.*

SUB-SECT. 1.—*By the Secretary of State for War.*

Land for military purposes.

237. Land may be acquired by the Secretary of State for the War Department either under the Defence Act, 1842, and Acts amending it (*e*), or under the Military Lands Act, 1892, and Acts amending it (*f*). He has also power to acquire lands for military tramways (*g*).

Procedure to acquire.

238. A complete procedure for the purchase and taking of the land and for the assessment and payment of the compensation is contained in the Defence Act, 1842, and the method of assessment therein provided is by jury or by two justices (*h*), but it has been further

(*t*) 10 & 11 Vict. c. 27. As to granting provisional orders for the construction of piers and harbours, see title WATER AND WATERCOURSES.

(*a*) See General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), and the General Pier and Harbour Act, 1861, Amendment Act, 1862 (25 & 26 Vict. c. 19).

(*b*) 10 & 11 Vict. c. 65. See title BURIALS, Vol. III., p. 401.

(*c*) *Ibid.*, s. 6.

(*d*) *Ibid.*, s. 17.

(*e*) 5 & 6 Vict. c. 94, amended by the Defence Act, 1854 (17 & 18 Vict. c. 67), the Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117), Defence Act, 1859 (22 Vict. c. 12), Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 8, Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106), Defence Act, 1860 (23 & 24 Vict. c. 112), Defence Act Amendment Act, 1864 (27 & 28 Vict. c. 89), Defence Act, 1865 (28 & 29 Vict. c. 65), Defence Acts Amendment Act, 1873 (36 & 37 Vict. c. 72), Ranges Act, 1891 (54 & 55 Vict. c. 54), s. 11. As to conditions necessary to exercise of powers, see pp. 6 and 9, *ante*.

(*f*) 55 & 56 Vict. c. 43, amended by Military Lands Act, 1897 (60 & 61 Vict. c. 6), Military Lands Act, 1900 (63 & 64 Vict. c. 56), Military Lands Act, 1903 (3 Edw. 7, c. 47).

(*g*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65).

(*h*) Defence Act, 1842 (5 & 6 Vict. c. 94), ss. 19 *et seq.* As to commons, see Defence Act, 1854 (17 & 18 Vict c. 67), ss. 1—3, and generally as to procedure see Defence Act, 1860 (23 & 24 Vict. c. 112), which also provides for the compensation to be determined by two justices when the amount claimed does not exceed £200 (s. 13). There are also provisions for the assessment of compensation to absent

provided that for the purchase or acquisition of lands wanted for the service of the Admiralty or of the War Department, or for the defence of the realm, the Secretary of State for the War Department may use all or any of the powers and provisions contained in the Lands Clauses Acts, and such powers and provisions are to be treated as if they were contained in the Defence Act, 1842 (*i*). It has also been enacted that in the case of land acquired either under the Defence Act, 1842, and the Acts amending the same, or for military purposes under any Act with which the Lands Clauses Acts are incorporated, the person or authority acquiring the land may require that the compensation to be paid for the land be settled by arbitration and not by reference to a jury, and thereupon the provisions of the Lands Clauses Acts with reference to arbitration will, if not already applicable, apply for the purpose of settling compensation (*k*). In assessing the compensation under these Acts, the owner is entitled to be compensated for the injurious affection of his adjoining lands arising from the use of the lands taken for the purposes for which they are taken (*l*).

Under Defence Acts.

239. When the land is required to be purchased or taken under the Military Lands Act, 1892 (*m*), the Lands Clauses Acts are incorporated with certain minor exceptions (*n*), and when the Secretary of State is the purchaser, the bond required to be given on entry before purchase needs to be only under the seal of the Secretary of State and is sufficient without addition of sureties (*o*), and upon payment of the compensation to any person in respect of any interest, all the interest of that person vests in the Secretary of State without a conveyance being necessary, although the Secretary of State may require one (*o*). In this Act it is also provided that where any land is acquired under it, or for military purposes under any Act with which the Lands Clauses Acts are incorporated, the person or authority (*p*) acquiring the land may require that the compensation to be paid for the land be settled by arbitration, and thereupon the provisions of the Lands Clauses Acts with reference to arbitration will, if not already applicable, apply for the purpose of settling the compensation (*q*).

Under Military Lands Act.

The Secretary of State may also authorise the entry on land for the provision and repair of alignment marks (*r*), in which case full

Alignment marks.

parties (ss. 14—16), and to persons who are required to keep their lands free from buildings (ss. 17—18) and in respect of interests omitted to be purchased (ss. 36—38).

(*i*) Lands Clauses Consolidation Act Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 7.

(*k*) Ranges Act, 1891 (54 & 55 Vict. c. 54), s. 11.

(*l*) *Blundell* v. *R.*, [1905] 1 K. B. 516; and see *R.* v. *Abbott*, [1897] 2 I. R. 362; *Re Ned's Point Battery*, [1903] 2 I. R. 192.

(*m*) 55 & 56 Vict. c. 43.

(*n*) *Ibid.*, s. 2 (1). The omitted parts are Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 16, 17, 150, 151.

(*o*) *Ibid.*, s. 2 (3).

(*p*) The purchaser may also be a volunteer corps or the council of a county or borough, s. 1. As to the transfer of these powers to county associations, see Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 2, 3; and title ROYAL FORCES.

(*q*) 55 & 56 Vict. c. 43, s. 20.

(*r*) *Ibid.*, s. 21.

SECT. 2. Land required for Government Purposes.

compensation is to be paid to the owner, the amount to be determined by arbitration under the Arbitration Act, 1889 (*s*). Bye-laws may be made in certain cases in respect of rifle or artillery practice over sea, tidal water or shore. Persons injuriously affected or whose private rights are obstructed are entitled to compensation, to be ascertained in manner provided by the Lands Clauses Acts (*t*).

Military tramways.

240. A Secretary of State may be empowered by provisional order to acquire land for the purposes of military tramways, and for such purposes the provisions of the Lands Clauses Acts may be incorporated with such order, subject to such modifications as the Board of Trade deems expedient (*a*).

Manœuvres.

Military manœuvres may be authorised over land within certain limits by an Order in Council (*b*). Persons who suffer damage in consequence are entitled to full compensation, which is settled by a compensation officer or officers appointed by the military manœuvres commission, who make regulations as to procedure (*c*). Disputes as to amount are settled by arbitration under the Arbitration Act, 1889 (*s*).

Barracks.

The Secretary of State for the War Department is also authorised to acquire lands for barracks and otherwise for the localisation of the military forces, and for these purposes the Lands Clauses Acts are incorporated, with slight modifications (*d*).

SUB-SECT. 2.—*By the Admiralty.*

Land for naval purposes.

241. The Admiralty have the same powers of acquiring land under the Defence Acts and the Military Lands Acts as the Secretary of State for the War Department, and the compensation is assessed and payable in the same manner (*e*). The Admiralty have also the same powers as to acquiring lands for tramways (*f*).

Signal and coastguard stations.

In addition, the Admiralty have powers to acquire ground necessary for signal and telegraph stations (*g*). The compensation is to be assessed by a jury; but this will be subject to the right of the Admiralty to require arbitration under the Lands Clauses Acts (*h*). The Admiralty have also power to acquire lands for coastguard stations (*i*). The compensation is ascertained as provided in the Customs Consolidation Act, 1853, which incorporates the Lands Clauses Acts with variations (*k*).

(*s*) 52 & 53 Vict. c. 49.
(*t*) Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 2.
(*a*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65).
(*b*) Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 1.
(*c*) *Ibid.*, s. 6.
(*d*) Military Forces Localisation Act, 1872 (35 & 36 Vict. c. 68).
(*e*) Naval Works Act, 1895 (58 & 59 Vict. c. 35), s. 2; Naval Lands (Volunteers) Act, 1908 (8 Edw. 7, c. 25); and see p. 158, *ante*.
(*f*) Naval Works Act, 1899 (62 & 63 Vict. c. 42), s. 2; and see p. 159, *ante*.
(*g*) Admiralty (Signal Stations) Act, 1815 (55 Geo. 3, c. 128).
(*h*) See p. 78, *ante*.
(*i*) Coastguard Service Act, 1856 (19 & 20 Vict. c. 83), s. 5.
(*k*) 16 & 17 Vict. c. 107, ss. 336—345; and see p. 161, *post*.

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Land required for Government Purposes.

Incorporation of clauses.

242. In special Acts conferring on the Admiralty compulsory powers of purchasing or taking particular lands, the Lands Clauses Acts and the sections of the Railways Clauses Consolidation Act, 1845 (*l*), dealing with errors and omissions in plans (*m*), are incorporated, except so much as relates to access to the special Act, and subject to certain special provisions (*n*). Among these provisions is one giving the Admiralty the right to withdraw a notice for the compulsory purchase or taking of lands in certain circumstances, within two months of the service, by giving a second notice to that effect either as to the whole or part of the land. The owner in such circumstances is entitled to compensation for such damage (if any) as he may have sustained in consequence of the giving of the first notice (*o*). The provisions of the Lands Clauses Acts as to superfluous lands are not to apply to lands purchased by the Admiralty (*p*), but persons are not deprived of their right of pre-emption (*q*). In special Acts the time limit for compulsory purchase is to be five years, and the incorporation of certain requirements as to bonds is also excepted (*r*).

SUB-SECT. 3.—*For the Customs.*

Land for customs purposes.

243. The Commissioners of Works are authorised to purchase and acquire land and buildings necessary for the service of His Majesty's customs, and for these purposes the Lands Clauses Acts are incorporated, except so much thereof as relates to the purchase of land otherwise than by agreement (*s*). They may also, with the authority of the Treasury, compulsorily acquire, hire, or take on lease certain lands, not exceeding half an acre at any one station, for the purpose of erecting watch-houses, dwelling-houses, and other buildings requisite for the security and protection of the revenues of customs and excise, together with all necessary ways (*a*). Provision is made for putting the officers of customs in possession, and for summoning a jury to assess the compensation (*b*), and ss. 40 to 68 of the Lands Clauses Consolidation Act, 1845, are incorporated for this purpose (*c*). The jury is required to ascertain the compensation to be paid for any such lands, and the proportion to be paid out of such compensation to any lessee or tenant at will or otherwise of such lands, and the proportion so to be paid must be returned by verdict (*d*). Provision is also made for compensation when lands have been taken on hire, for the injury

(*l*) 8 & 9 Vict. c. 20.
(*m*) Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), ss. 7—10.
(*n*) *Ibid.*, s. 5.
(*o*) *Ibid.*, s. 6.
(*p*) *Ibid.*, s. 14.
(*q*) *Ibid.*, s. 16.
(*r*) *Ibid.*, s. 8.
(*s*) Customs Building Act, 1879 (42 & 43 Vict. c. 36), s. 5.
(*a*) *Ibid.*, s. 6; Customs Consolidation Act, 1853 (16 & 17 Vict c. 107), s. 335.
(*b*) Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107), s. 337.
(*c*) *Ibid.*, s. 338; and see *Re Wood, Ex parte Commissioner of Works* (1886), 31 Ch. D. 607, C. A.
(*d*) *Ibid.*, s. 340.

SECT. 2. Land required for Government Purposes.

done to the owner on delivery up to him by reason of the removal of the buildings erected for the public service, the amount to be settled by two justices (*e*). There are also special provisions for the application of the purchase-moneys (*f*).

SUB-SECT. 4.—*For the Post Office.*

Post Office.

244. The Postmaster-General may purchase land for the purpose of the Post Office with the consent of the Treasury, and the Lands Clauses Acts are applicable for this purpose (*g*). The bond required in case of entry before purchase is required to be under the seal of the Postmaster-General and is sufficient without sureties (*h*). A provisional order is necessary to take lands compulsorily (*i*).

Telegraphs.

The Postmaster-General has also power to place telegraph wires and posts in, over, and under certain public and private lands, subject to certain restrictions (*k*). In exercising these powers he must do as little damage as can be and make full compensation, the amount and application of which is to be determined under the Lands Clauses Acts (*l*).

SUB-SECT. 5.—*For Prisons.*

Prisons.

245. A Secretary of State has power, with the consent of the Treasury, to alter, enlarge, and rebuild any prison and to build a new prison (*m*), and may acquire compulsorily lands contiguous to a prison and required for the purposes of enlarging it or rendering it more safe and commodious (*n*). For these purposes the Lands Clauses Acts are incorporated, with the exception of the provisions relating to subscription of capital, entry upon lands, time limit for purchase, and access to the special Act (*o*). He has also power, with the consent of the Treasury, to purchase court-houses, rooms etc., situate within or forming part of a prison, and the Lands Clauses Acts are incorporated for this purpose (*p*).

(*e*) Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107), s. 341.

(*f*) Customs Buildings Act, 1879 (42 & 43 Vict. c. 36), s. 6; Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 275, 276; Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107), ss. 343, 344. See, generally, title REVENUE.

(*g*) Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20), s. 3.

(*h*) *Ibid.*, s. 3 (b).

(*i*) *Ibid.*, s. 3 (c), (d), (e). And see p. 8, *ante*.

(*k*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 6—8, 12, 13, 21—29; Telegraph Act, 1878 (41 & 42 Vict. c. 76); Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 2. The last-mentioned Act gives the Postmaster-General compulsory powers on obtaining the necessary order. See also Telegraph (Construction) Act, 1908 (8 Edw. 7, c. 33).

(*l*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 7, 21; Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 2. See *Re St. James' and Pall Mall Electric Lighting Co.*, [1904] W. N. 68; 73 L. J. (K. B.) 518. See, generally, titles POST OFFICE; TELEGRAPHS AND TELEPHONES.

(*m*) Prison Act, 1884 (47 & 48 Vict. c. 51), s. 2.

(*n*) *Ibid.*, and Prison Act, 1865 (28 & 29 Vict. c. 126), s. 44 (3).

(*o*) Prison Act, 1865 (28 & 29 Vict. c. 126), s. 44 (1).

(*p*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 49. See, generally, title PRISONS AND REFORMATORIES.

SECT. 3.—*Land required for Purposes of Local Government.*

SECT. 3. Land required for Purposes of Local Government.

SUB-SECT. 1.—*Under Public Health Acts* (*q*).

Acquisition of land under Public Health Acts.

246. Sanitary authorities outside London have power to purchase lands for the purposes of the Public Health Acts, and for this purpose the Lands Clauses Acts are incorporated, except the provisions relating to access to the special Act and s. 127 of the Lands Clauses Consolidation Act, 1845 (*r*). The clauses with respect to the purchase and taking of lands otherwise than by agreement cannot be enforced except under a provisional order duly confirmed (*s*).

Under the Public Health Acts, sanitary authorities have other powers of interfering with land, as, for example, in order to lay sewers or water mains (*t*). A person who sustains damage by reason of the exercise of these powers in relation to any matter as to which he is not himself in default, is entitled to full compensation, and any dispute as to the fact of damage or amount of compensation is required to be settled by arbitration in manner provided in the Public Health Act, 1875 (*u*). If the compensation claimed does not exceed the sum of £20, the same may, at the option of either party, be ascertained by and recovered before a court of summary jurisdiction (*a*).

For the purposes of support to sanitary works from mines and minerals, the sections of the Waterworks Clauses Acts with respect to mines are incorporated with the Public Health Acts, with slight variations (*b*).

SUB-SECT. 2.—*Under the Housing of the Working Classes Acts* (*c*).

Housing of the working classes.

247. When local authorities are authorised to take lands under Part I. of the Housing of the Working Classes Act, 1890 (*d*), the Lands Clauses Acts, as amended by the provisions in the Second Schedule to that Act regulate and apply to the purchase and taking of lands (*e*). These provisions very considerably modify the

(*q*) See title PUBLIC HEALTH ETC.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 175, 176.

(*s*) *Ibid.*, s. 176, and see p. 8, *ante*. The word "lands" does not include water rights (see s. 332).

(*t*) *Ibid.*, ss. 16, 54.

(*u*) *Ibid.*, s. 308. The arbitration proceedings are governed by ss. 179—181. The arbitrator only settles the amount, and the award may be enforced by action (*Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595). As to injurious affection, see *Horton* v. *Colwyn Bay and Colwyn Urban District Council*, [1908] 1 K. B. 327, C. A. Acts done by sanitary authorities under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), do not entitle the persons injured to compensation, although such powers are transferred to sanitary authorities by the Public Health Act, 1875 (38 & 39 Vict. c. 55) (*Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264).

(*a*) *Ibid.*, s. 308. When any compensation directed to be paid by the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), is in dispute, the method for determining the amount is ascertained in the manner provided by the Public Health Acts (see s. 10).

(*b*) Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37). As to the effect of these clauses, see Part IV., p. 49, *ante*.

(*c*) See, generally, under title PUBLIC HEALTH ETC.

(*d*) 53 & 54 Vict. c. 70.

(*e*) *Ibid.*, s. 20.

SECT. 3. Land required for Purposes of Local Government.

procedure of the Lands Clauses Acts as to assessing compensation and other matters. The compensation is assessed by an arbitrator (*f*).

Compensation.

In assessing the compensation payable in respect of any lands, or of any interests in lands, proposed to be taken under Part I., the estimate of the value of such lands or interests is required to be based upon the fair market value as estimated at the time of the valuation being made of such lands (*g*), and of the several interests in such lands, due regard being had to the nature and the condition of the property, to the probable duration of the buildings in their existing state, and to the state of repair thereof, without any additional allowance in respect of the compulsory purchase of an area, or of any part of an area, in respect of which an official representation has been made, or of any lands included in a scheme which, in the opinion of the arbitrator, have been so included as falling under the description of property which may be constituted an unhealthy area under the said Part I. (*h*). Additions and improvements, not necessary for maintaining the property in repair, and made after the date of the publication of an advertisement stating the fact of the improvement scheme having been made, are not to be included in the compensation, nor is any sum to be allowed for interests acquired after that date which may increase the amount of the compensation payable (*i*).

Unhealthy areas.

248. In the case of any house or premises situate within an unhealthy area (*k*), the arbitrator is required to receive evidence to prove (1) that the rental of the house or premises was enhanced by reason of the same being used for illegal purposes or being so overcrowded as to be dangerous or injurious to the health of the inmates; or (2) that the house or premises are in such a condition as to be a nuisance within the meaning of the Acts relating to nuisances, or are in a state of defective sanitation, or are not in reasonably good repair; or (3) that the house or premises are unfit, and not reasonably capable of being made fit, for human habitation.

If the arbitrator is satisfied by such evidence, then the compensation must, in the first case, so far as it is based on rental, be based on the rental which would have been obtainable if the house or premises were occupied for legal purposes and only by the

(*f*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Sched. (4).

(*g*) *E.g.*, as to the value of a tied public-house, see *Re Chandler's Wiltshire Brewery Co. and London County Council*, [1903] 1 K. B. 569.

(*h*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 21 (1), (a). Compare *Higgins* v. *Dublin Corporation* (1891), 28 L. R. Ir. 484.

(*i*) *Ibid.*, s. 21 (1), (b); and see *Wilkins* v. *Birmingham Corporation* (1883), 25 Ch. D. 78.

(*k*) In improvement schemes under the Act there may be included the unhealthy area in order to remedy which the scheme is made, and neighbouring lands which are included for the purpose of making the scheme efficient (see s. 6 (1) (a)). In assessing the compensation for these latter, these provisions as to the use and state of the premises do not apply, nor does the provision as to an addition for compulsory purchase. Compare *Dublin Corporation* v. *Dowling* (1880), 6 L. R. Ir. 502.

number of persons whom the house or premises were, under all the circumstances of the case, fitted to accommodate without such overcrowding as is dangerous or injurious to the health of the inmates, and must in the second case be the amount estimated as the value of the house or premises if the nuisance had been abated, or if they had been put into a sanitary condition, or into reasonably good repair, after deducting the estimated expense of abating the nuisance, or putting them into such condition or repair, as the case may be, and must in the third case be the value of the land and of the materials of the buildings thereon (*l*).

Easements.

249. When the local authority purchase the land required for the scheme, they must pay compensation to persons proved to have sustained loss by reason of the extinguishment or vesting, of rights of way, of laying pipes and other easements, and such compensation is to be determined in the same manner as the compensation for the lands is determinable, or as near thereto as circumstances admit (*m*). The right to compensation does not arise until the loss is sustained; thus, although an easement of light is extinguished, the right to compensation does not arise until the access of light is interrupted (*n*).

Obstructive buildings.

250. Under Part II. of the Housing of the Working Classes Act, 1890, local authorities may in certain cases acquire obstructive buildings in order to remove them (*o*). The owner in such cases may claim to retain the site (*p*). The compensation in either case is to be settled by arbitration under the Lands Clauses Acts (*q*). An owner of a house or manufactory cannot insist on his entire building being taken when part only is proposed to be taken as obstructive, and where the part proposed to be taken can, in the opinion of the arbitrator to whom the question of disputed compensation is submitted, be severed from the remainder of the house or manufactory without material detriment thereto. He is, however, to be entitled to compensation for severance (*r*). When the demolition of the obstructive building adds to the value of the building it obstructed, there is a provision for the recovery of so much of the compensation as may be equal to the improved value (*s*).

Improvement schemes.

251. Local authorities under Part II. of the Act may also carry out the improvement schemes under orders which may incorporate the Lands Clauses Acts, the amount of compensation being settled by arbitration (*t*). Rights of way and other easements in land

(*l*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 21.
(*m*) *Ibid.*, s. 22.
(*n*) *Badham* v. *Marris* (1881), 45 L. T. 579 ; *Swainston* v. *Finn and Metropolitan Board of Works* (1883), 52 L. J. (CH.) 235 ; *Barlow* v. *Ross* (1890), 24 Q. B. D. 381, C. A. ; *Re Harvey and London County Council* (1909), *Times*, January 18.
(*o*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 38.
(*p*) *Ibid.*, s. 38 (5).
(*q*) *Ibid.*, s. 38 (6).
(*r*) *Ibid.*, s. 38 (7).
(*s*) *Ibid.*, s. 38 (8).
(*t*) *Ibid.*, s. 39 (7).

SECT. 3. **Land required for Purposes of Local Government.**

purchased when extinguished are subject to the like compensation as under Part I. (*a*).

Principles of compensation.

In settling the amount of compensation under Part II. no additional allowance is to be made for compulsory purchases except as regards neighbouring lands when included in a scheme (*b*). The arbitrator must also have regard to, and make an allowance in respect of, any increased value which in his opinion will be given to the dwelling-houses of the same owner by the alteration or demolition of any buildings by the local authority (*b*). He is also required to receive evidence of a similar nature, as under Part I., as to the use, condition, and repair of the house, and to award compensation on a similar basis (*c*). There is no provision as to alterations made after notice of the scheme. There are also provisions regulating the general procedure of the arbitration and purchase (*d*).

Lodging-houses.

252. Under Part III., local authorities may be authorised to acquire land for lodging-houses by order incorporating the Lands Clauses Acts (*e*). The compensation is to be assessed by a single arbitrator, and there are special provisions in relation thereto (*f*).

Entry etc.

253. Local authorities are also given power on certain conditions to enter and value premises which they are authorised to purchase under Parts I. and II. (*g*). They may also make a reasonable allowance for expenses of removal to certain tenants of buildings which they purchase under these parts of the Act (*h*).

SUB-SECT. 3.—*For Educational Purposes* (*i*).

Land for schools.

254. An education authority may purchase land in order to provide schools (*k*), either elementary or secondary, and the Lands Clauses Acts are incorporated for the purpose, except the provisions relating to access to the special Act (*l*). A provisional order confirmed by Parliament is necessary before the authority can put in force the powers with respect to the purchase and taking of land

(*a*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 39 (8).
(*b*) *Ibid.*, s. 41 (2). As to neighbouring lands, see Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 7.
(*c*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 41 (3).
(*d*) *Ibid.*, s. 41 (4)—(11).
(*e*) *Ibid.*, s. 57, which incorporates ss. 175—178 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), under which the order may be made.
(*f*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 57, and Housing of the Working Classes Act, 1900 (63 & 64 Vict. c. 59), s. 7. See this more particularly dealt with under title PUBLIC HEALTH ETC.
(*g*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 77.
(*h*) *Ibid.*, s. 78.
(*i*) See title EDUCATION.
(*k*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 19; Education Act, 1902 (2 Edw. 7, c. 42), s. 5; Education (Administrative Provisions) Act, 1907 (7 Edw. 7, c. 43), s. 1.
(*l*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 20.

otherwise than by agreement (*m*), but they can interfere with easements of adjoining lands over land purchased by agreement, subject to payment of compensation; thus, they may erect a building on the land purchased which will interfere with an easement of light (*n*).

SECT. 3. Land required for Purposes of Local Government.

SUB-SECT. 4.—*Under the Local Government Acts*, 1888 *and* 1894.

County councils.

255. County councils may acquire lands for the purpose of their duties, and may be empowered by a provisional order duly confirmed to acquire lands compulsorily according to the provisions of the Lands Clauses Acts (*o*).

Parish councils.

256. Parish councils may acquire land by agreement for certain purposes (*p*), and if they are unable to acquire land for these purposes by agreement the county council, or, on refusal, the Local Government Board, may make an order for putting in force, as regards the lands required, or part thereof, the provisions of the Lands Clauses Acts with respect to the purchase and taking of land otherwise than by agreement (*q*). The order is carried into effect by the county council (*r*). It must incorporate the Lands Clauses Acts and the sections of the Railways Clauses Consolidation Act, 1845, with respect to mines, with the necessary adaptations (*s*). The land is to be assured to the parish council (*t*). Any question of disputed compensation must be referred to the arbitration of a single arbitrator appointed by the parties, or, on failure to agree, on the application of either of them, by the Local Government Board (*a*). Provision is made for the appointment of another arbitrator in case of death, or inability or failure to act (*b*). The arbitrator is deemed to be an arbitrator within the meaning of the Lands Clauses Acts, but he is required to determine the amount of the costs, and he has power to disallow the costs of witnesses who in his opinion have been unnecessarily called, or costs otherwise unnecessarily incurred (*c*).

(*m*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 20 (2)—(6). If the purpose for which the land is taken is *ultra vires*, they will be restrained from taking the land notwithstanding a provisional order (*Batson* v. *London School Board* (1903), 67 J. P. 457).

(*n*) *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437, C. A.

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65, which incorporates s. 176 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which in turn incorporates the Lands Clauses Acts with some exceptions (see p. 163, *ante*).

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9, as amended by the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), which is repealed by the Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36).

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9 (2), (4), (5), as amended (see note (*p*), *supra*).

(*r*) *Ibid.*, s. 9 (9), as amended by the Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54); see note (*p*), *supra*.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 9 (10); and see p. 49, *ante*.

(*t*) *Ibid.*, s. 9 (14), as amended (see note (*p*), *supra*).

(*a*) *Ibid.*, s. 9 (10), which incorporates s. 3 (4), (a), (b), and (c) of the Allotments Act, 1887 (50 & 51 Vict. c. 48). These provisions of the latter Act have been repealed, except so far as they are applied by any other enactment (Small Holdings and Allotments Act, 1907 (7 Edw. 7, c. 54), Sched. II.); see note (*p*), *supra*.

(*b*) Allotments Act, 1887 (50 & 51 Vict. c. 48), s. 3 (4), (b).

(*c*) *Ibid.*, s. 3 (4), (c)

SECT. 3. SUB-SECT. 5.—*For Small Holdings and Allotments.*

Land required for Purposes of Local Government.

Powers of county councils.

Powers of other councils.

257. A county council (*d*) may, for the purpose of providing small holdings for certain persons, by agreement purchase or take on lease land, whether within or without their county (*e*). If a county council are unable to acquire by agreement and on reasonable terms suitable land for the purpose of providing small holdings for such persons, they may for that purpose acquire land compulsorily (*f*).

The council of a borough, urban district, or parish may, for the purpose of providing allotments by agreement, purchase or take on lease land, whether situate within or without their borough, district, or parish (*g*). If a council are unable to acquire by agreement and on reasonable terms suitable land for the purpose of allotments, they may acquire land for that purpose compulsorily (*h*).

Incorporation of Lands Clauses Acts.

For the purpose of the purchase of land by agreement for either small holdings or allotments the Lands Clauses Acts are made applicable, with the exception of the provisions of those Acts with respect to the purchase and taking of land otherwise than by agreement (*i*). Additional powers of leasing are also conferred upon certain limited owners (*j*).

Enabling orders.

If a council desire to purchase or hire land compulsorily for the purpose of providing either small holdings or allotments, they must first obtain an order of the Board of Agriculture and Fisheries authorising them so to do (*k*).

Arbitration as to compensation on purchase.

258. In the case of compulsory purchase of land for either small holdings or allotments, the order must incorporate, subject to the necessary adaptations, the Lands Clauses Acts and the clauses with respect to mines in the Railways Clauses Consolidation Act, 1845 (*l*); but any question of disputed compensation is to be determined by a single arbitrator appointed by the Board of Agriculture and Fisheries, who is to be deemed to be an arbitrator under the Lands Clauses Acts, and the provisions of these Acts with respect to arbitration, with the modifications hereinafter mentioned, are to

(*d*) The expression "county council" includes the council of a county borough.

(*e*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 7 (1); and see titles ALLOTMENTS, Vol. I., p. 331; SMALL HOLDINGS. County councils may delegate their powers to councils of boroughs and urban districts (*ibid.*, s. 18). On the failure of county councils to exercise their powers, these powers may be exercised in certain cases by small holdings commissioners (*ibid.*, s. 6 (2), and s. 20).

(*f*) *Ibid.*, s. 7 (2); and see s. 41 as to restrictions on the land which may be taken.

(*g*) *Ibid.*, s. 25 (1). County councils may act, and exercise the powers of district and parish councils, in case of certain defaults (*ibid.*, s. 24), and in London the powers may be exercised by the London County Council (*ibid.*, s. 36).

(*h*) *Ibid.*, s. 25 (2).

(*i*) *Ibid.*, s. 38. As regards lands belonging to the Duchy of Lancaster, s. 178 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), is also made applicable.

(*j*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 40.

(*k*) *Ibid.*, s. 39 (1)—(4). In the case of parish councils proposing to acquire land compulsorily, the county council exercise the powers for them (*ibid.*, s. 39 (7)). For the procedure to obtain the necessary orders, see *ibid.*, Sched. I., Parts I. and II.

(*l*) 8 & 9 Vict. c. 20; and see p. 49, *ante*. Such regulations have been made under date 24th March, 1908.

apply accordingly (*m*). In determining the amount of any disputed compensation, no additional allowance may be made on account of the purchase being compulsory (*n*), and the arbitrator, in assessing compensation, is required, so far as practicable, to act on his own knowledge and experience; but subject thereto he must hear, by themselves or their agents, any authorities or parties authorised to appear and their witnesses, but he must not, except in such cases as the Board of Agriculture and Fisheries direct, hear counsel or expert witnesses (*o*). A scale of costs may be fixed by the Board of Agriculture and Fisheries with the concurrence of the Lord Chancellor to be applicable to such an arbitration, and an arbitrator, notwithstanding anything in the Lands Clauses Acts, may determine the amount of costs, and disallow the costs of unnecessary witnesses or costs in his opinion otherwise unnecessarily incurred (*p*). In the case of glebe land or other land belonging to an ecclesiastical benefice, the sum due for compensation is to be paid to the Ecclesiastical Commissioners, who are to apply it as money paid upon a sale under the Ecclesiastical Leasing Acts of land belonging to a benefice (*q*).

Valuation on compulsory hiring.

259. In the case of an order for compulsory hiring, the Board of Agriculture and Fisheries are required to make regulations for the purpose of carrying the order into effect, and of protecting the council and persons interested in the land, and the order must incorporate such regulations, together with such provisions of the Lands Clauses Acts and the clauses with respect to mines in the Railways Clauses Consolidation Act, 1845 (*r*), as may, subject to the prescribed adaptations, appear to the Board necessary or expedient for the purpose, and the order must also determine the terms and conditions of the hiring other than the rent (*s*). In determining the amount of any disputed compensation no additional allowance may be made on account of the hiring being compulsory (*n*). The determination of the amount of the rent to be paid by the council for the land compulsorily hired, the amount of any other compensation to be paid by the council to any person entitled thereto in respect of the land or any interest therein, or in respect of improvements executed on the land or otherwise, and, where part only of a holding held for an unexpired term is hired, the rent to be paid for the residue of the holding during the remainder of that term, must, in default of agreement, be by valuation by a single valuer appointed by the Board, provided that if the land hired is in the occupation of a tenant, he may, by notice in writing served on the council before the determination of his tenancy, require that any

(*m*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), Sched. I., Part I. (1). The order is deemed to be the special Act and the council the promoters of the undertaking (*ibid.*, Sched. I., Part I. (7)).

(*n*) *Ibid.*, s. 39 (5).

(*o*) *Ibid.*, Sched. I., Part I. (5).

(*p*) *Ibid.*, Sched. I., Part I. (6).

(*q*) *Ibid.*, Sched. I., Part I. (8).

(*r*) 8 & 9 Vict. c. 20; and see p. 49, *ante*. Such regulations have been made under date 24th March, 1908.

(*s*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), Sched. I., Part II. (1), (2).

SECT. 3. Land required for Purposes of Local Government.

claim by him against the council, which under the Agricultural Holdings Act, 1908 (*t*), might be referred to arbitration under that Act, shall be so referred, and in such case those claims shall be determined by arbitration under that Act and not by valuation under the Small Holdings and Allotments Act, 1908.

Matters to be considered by valuer.

The valuer, in fixing the rent to be paid for the land compulsorily hired, is required to take into consideration the rent (if any) at which the land has been let and the annual value at which the land is assessed for purposes of income tax or rating, the loss (if any) caused to the owner by severance, the terms and the conditions of the hiring, including any reservation of sporting or fishing rights, and all the other circumstances connected with the land (*u*); but he is not to make any allowance in respect of any use to which the land compulsorily hired might otherwise be put by the owner during the term of hiring, being a use in respect of which the owner is entitled to resume possession of the land under the Act (*v*).

Compensation for depreciation.

260. Any compensation awarded to a tenant in respect of any depreciation of the value to him of the residue of his holding, caused by the withdrawal from the holding of the land compulsorily hired, must as far as possible be provided for by taking such compensation into account in fixing the rent to be paid for the residue of the holding during the remainder of the term for which it is held by the tenant (*x*).

Documents to be produced.

261. Any person interested in any valuation must give the valuer all such assistance, information and explanations as he may require, and produce to the valuer or give him access to all such books, accounts, vouchers and other documents relating to the land to be compulsorily hired as he may reasonably require for the purposes of valuation, and such expenses as the valuer certifies to have been properly incurred by any person in furnishing such assistance, information, and explanation, or otherwise in relation to the valuation, must be paid by the council (*y*).

Withdrawal of notice to treat.

262. If after the determination of the amount of the compensation payable to any person, whether in the case of compulsory purchase or of compulsory hiring, and including in the latter case the rent, it appears to the council that the land cannot be let for small holdings or allotments, as the case may be, at such a rent as will secure the council from loss, the council may at any time within six weeks after the determination of the amount, by notice in writing withdraw any notice to treat served on that person or on any other person interested in the land. On such withdrawal the person served is entitled to obtain from the council compensation for loss or expenses sustained or incurred in consequence of the notice to treat

(*t*) 8 Edw. 7, c. 28. See title AGRICULTURE, Vol. I., p. 258.
(*u*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), Sched. I., Part II. (3).
(*v*) *Ibid.*, Sched. I., Part II. (4). As to such purposes see s. 46 of that Act.
(*x*) *Ibid.*, Sched. I., Part II. (5).
(*y*) *Ibid.*, Sched. I., Part II. (6).

and the withdrawal, and the amount of this compensation is to be settled by arbitration, in default of agreement (*z*).

SUB-SECT. 6.—*For Other Purposes.*

Isolation hospitals.

263. Power to acquire land compulsorily may be obtained under the Isolation Hospitals Act, 1893 (*a*), for the purpose of erecting thereon an isolation hospital (*b*). This power is obtained by provisional order incorporating the Lands Clauses Acts, and the provisions of the Public Health Act, 1875 (*c*), relating to the acquisition of land are for this purpose made applicable

Under Diseases of Animals Act.

These above-mentioned provisions, with a slight variation as to advertisements and notices, are incorporated in the Diseases of Animals Act, 1894 (*d*), for the purpose of enabling land to be acquired for wharves and other purposes connected with that Act.

Towns improvements.

In special Acts incorporating the Towns Improvement Clauses Act, 1847 (*e*), the Lands Clauses Acts are also thereby incorporated for the purpose of acquiring lands and making compensation for damage done in the execution of the powers (*f*). Special provision is made for damage caused by altering the level of any street (*g*).

Open spaces.

Local authorities have powers under the Open Spaces Act, 1906 (*h*), of interfering with certain rights upon making compensation to be determined in a manner provided by the Lands Clauses Acts.

Highways.

Under the Highway Act, 1835 (*i*), certain powers of interfering with land are authorised, the compensation to be settled by justices in manner therein provided (*j*). Land also may be acquired for widening certain roads, the compensation to be settled by a jury at quarter sessions (*k*). Provision is made for the costs, for the vesting of the land, and for payment of the purchase-money (*l*).

SUB-SECT. 7.—*Special Provisions as to London* (*m*).

London.

264. Besides the general Acts applicable to the metropolis as to the rest of the country, there are certain Acts of a permanent nature peculiar to London under which land may be taken, interfered with, or injuriously affected.

Street improvements.

Councils of metropolitan cities and boroughs are empowered to alter and improve streets, and for that purpose they are authorised

(*z*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 39 (8).
(*a*) 56 & 57 Vict. c. 68.
(*b*) *Ibid.*, s. 11. See title PUBLIC HEALTH ETC.
(*c*) 38 & 39 Vict. c. 55, ss. 175—178. See p. 163, *ante*.
(*d*) 57 & 58 Vict. c. 57, ss. 32, 33; and see also Diseases of Animals Act, 1903 (3 Edw. 7, c. 43), and title ANIMALS, Vol. I., pp. 363, 430.
(*e*) 10 & 11 Vict. c. 34.
(*f*) *Ibid.*, s. 19.
(*g*) *Ibid.*, s. 21.
(*h*) 6 Edw. 7, c. 25, s. 13. See also title OPEN SPACES AND RECREATION GROUNDS.
(*i*) 5 & 6 Will. 4, c. 50.
(*j*) *Ibid.*, ss. 25, 49, 51—54, 67. See title HIGHWAYS, STREETS AND BRIDGES.
(*k*) *Ibid.*, s. 82.
(*l*) *Ibid.*, ss. 82, 83. As to minerals near a road, see Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 27; and see *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301.
(*m*) See title METROPOLIS.

SECT. 3. Land required for Purposes of Local Government.

to purchase and take such houses, walls, buildings, lands, tenements, or hereditaments as are necessary for the purpose (*n*). They have power to adjudicate as to what houses and land are necessary, and if they do so *bonâ fide* their adjudication will not be disturbed (*o*). They may take part of a plot of land, but cannot take more than they reasonably require (*p*). They may take part of a house or building, but without the consent of the owner or person interested they cannot take part only if the removal of the part would substantially injure the house as it exists (*q*), and in such a case, if the owner desires to retain the part, he cannot be deprived of it (*r*), and if the whole is taken and the surplus land is sold, he has a right of pre-emption (*s*). The compensation is to be settled by a jury at quarter sessions (*t*). Provision is also made for payment of costs, application of purchase-money, and vesting of premises (*a*). Tenants are to receive six months' notice to quit; and, if they are required to give up possession before the end of their time, they are entitled to compensation, which is to be assessed in the same manner as for the purchase of lands (*b*).

Sewers.

265. Under the Metropolis Management Acts the London County Council and metropolitan borough and city councils are required to repair and maintain sewers and to make sewers, and to carry them through, across, or under streets and lands, making compensation for any damage done thereby (*c*). If injury is done to a mill or to water rights by the exercise of the powers of these Acts, compensation must be paid (*d*). Certain obstructions and projections of buildings may also be removed, subject to compensation (*e*). The amount of compensation to be paid, except when otherwise provided, is to be settled in case of dispute and recovered

(*n*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 80, commonly called Michael Angelo Taylor's Act.

(*o*) *Gard* v. *Commissioners of Sewers of the City of London* (1885), 28 Ch. D. 486, C. A.; *Lynch* v. *Commissioners of Sewers of the City of London* (1886), 32 Ch. D. 72, C. A.; *Fernley* v. *Limehouse Board of Works* (1899), 68 L. J. (CH.) 344; *Parry* v. *Hammersmith Metropolitan Borough* (1904), 21 T. L. R. 56; *Denman & Co.* v. *Westminster Corporation*, [1906] 1 Ch. 464.

(*p*) *Thomas* v. *Daw* (1866), 2 Ch. App. 1; *Gard* v. *Commissioners of Sewers of the City of London, supra.*

(*q*) *Teuliere* v. *St. Mary Abbotts, Kensington Vestry*, (1885), 30 Ch. D. 642; *Gibbon* v. *Paddington Vestry*, [1900] 2 Ch. 794; *Thompson* v. *Hammersmith Corporation*, [1906] 1 Ch. 299.

(*r*) *Aldis* v. *London Corporation*, [1899] 2 Ch. 169; *Fernley* v. *Limehouse Board of Works* (1900), 64 J. P. 328; *Pescod* v. *Westminster Corporation*, [1905] 2 Ch. 475; *Denman & Co.* v. *Westminster Corporation, supra.*

(*s*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 96. As to a right of pre-emption, see *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37, C. A.

(*t*) *Ibid.*, s. 82.

(*a*) *Ibid.*, ss. 81—95. As to costs of payment out of court, see *Re Fisher*, [1894] 1 Ch. 450, C. A.

(*b*) *Ibid.*, s. 90.

(*c*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 69, 135; Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104); Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 32.

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 86; and compare *Stainton* v. *Woolrych* (1856), 23 Beav. 225; *R.* v. *Metropolitan Board of Works* (1863), 3 B. & S. 710.

(*e*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 119, 120.

before two justices, unless the amount claimed exceeds £50, in which case the amount is to be settled by arbitration according to the provisions of the Lands Clauses Acts (*f*). In making and laying sewers the authority may enter and do the work before the compensation is paid (*g*).

In addition to the above powers, these authorities are authorised to purchase land and easements for various purposes and the Lands Clauses Acts are made applicable (*h*), but the compulsory powers can only be exercised by the London County Council, and for limited purposes connected with sewers and works, and subject to the consent of a Secretary of State (*i*). Appeals are allowed to the county council in certain cases in respect of orders and acts of borough councils, and the former may award compensation for any act done by the latter (*k*).

Powers of London County Council.

266. The London County Council and the city and borough councils have also large powers of executing works and of interfering with and taking lands for the purpose of preventing floods (*l*). Compensation is payable, the amount being settled by arbitration by a standing arbitrator, and there are provisions regulating his appointment and procedure (*m*).

Prevention of floods.

Sanitary authorities are authorised to drain and cleanse certain pools, ditches, and such-like places. Compensation is to be made in respect of interference with any ancient mill or any right connected therewith or with other rights to the use of water; disputes as to the amount are to be decided under the provisions of the Metropolis Management Act, 1855. The authorities in any such case may purchase the mill or water rights if they think fit (*n*).

Draining.

267. Under the London Building Acts compensation is payable when roads are required to be made beyond a certain width, or if certain buildings are required to be set back. The amount, if under £50, is to be settled in a summary manner; if above that sum, the amount is to be settled by arbitration under the provisions of the Lands Clauses Acts (*o*).

London Building Acts.

(*f*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 225. For the procedure before justices, see s. 226.

(*g*) *North London Rail. Co.* v. *Metropolitan Board of Works* (1859), 28 L. J. (CH.) 909; *Hughes* v. *Metropolitan Board of Works* (1861), 9 W. R. 517. As to the right of support, see *Metropolitan Board of Works* v. *Metropolitan Rail. Co.* (1868), L. R. 3 C. P. 612. No compensation is payable for damage caused by sewers if properly managed and constructed (*Hammond* v. *St. Pancras Vestry* (1874), L. R. 9 C. P. 316; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418), nor for temporary blocking of streets during construction (*Herring* v. *Metropolitan Board of Works* (1865), 34 L. J. (M. C.) 224).

(*h*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 150, 151.

(*i*) *Ibid.*, s. 152; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 22, 25.

(*k*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 211.

(*l*) Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (42 & 43 Vict. c. cxcviii.), ss. 14—16, 18.

(*m*) *Ibid.*, ss. 25—28.

(*n*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 43.

(*o*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 15, 23. See also London Building Acts Amendment Act, 1905 (5 Edw. 7, c. ccix.), as to provisions in respect of means of escape from fire.

SECT. 3. Land required for Purposes of Local Government.

268. The receiver for the metropolitan police district has power to acquire land compulsorily, subject to the approval of a Secretary of State, for police stations, offices, houses, and buildings required for the purposes of the metropolitan police (*p*). The procedure for assessing compensation is governed by the Lands Clauses Acts (*q*).

SECT. 4.—*Miscellaneous.*

SUB-SECT. 1.—*Church Building.*

Sites for Churches.

269. The Ecclesiastical Commissioners may in certain circumstances acquire sites for new churches or chapels or for enlarging churches and chapels. There are special provisions in the Church Building Acts for determining the amount of compensation by a jury and for payment of the compensation (*r*).

SUB-SECT. 2.—*Land Drainage* (*s*).

Land drainage.

270. Under various Acts land may be taken and interfered with for certain purposes connected with the drainage of land and the prevention of floods (*t*).

Commissioners of sewers are authorised to purchase and take lands for the purpose of improving, maintaining, and repairing various roads for the prevention of floods (*a*). If persons refuse to treat for the price and for the compensation for damage, the sum payable is to be assessed by a jury at quarter sessions, and they are also to settle and ascertain in what proportion the sum so assessed is to be paid to the several persons interested (*b*). Such matters as costs, conveyance, application of purchase-money, and sale of superfluous land are also provided for in a manner somewhat similar to the procedure under the Lands Clauses Acts (*c*).

If land is acquired or damage done pursuant to an order made under the Land Drainage Act, 1847 (*d*), the provisions of the Lands Clauses Acts are to be made applicable.

Various powers are given to commissioners of sewers by the Land Drainage Act, 1861 (*e*), and full compensation must be made for all injury sustained by any person by reason of the exercise of these powers. When they are authorised to remove obstructions, such as mill-dams, they must pay compensation, and the

(*p*) Metropolitan Police Act, 1886 (49 & 50 Vict. c. 20).
(*q*) *Ibid.*, s. 4.
(*r*) Church Building Act, 1818 (58 Geo. 3, c. 45), ss. 34, 36, 38—54. See title ECCLESIASTICAL LAW.
(*s*) Reference may also be made to titles SEWERS AND DRAINS; LAND IMPROVEMENT.
(*t*) These are—Sewers Act, 1833 (3 & 4 Will. 4, c. 22); Land Drainage Act, 1847 (10 & 11 Vict. c. 38); and the Land Drainage Act, 1861 (24 & 25 Vict. c. 133).
(*a*) Sewers Act, 1833 (3 & 4 Will. 4 c. 22), s. 24.
(*b*) *Ibid.*, s. 26.
(*c*) *Ibid.*, ss. 24—40.
(*d*) 10 & 11 Vict. c. 38, ss. 9—11.
(*e*) 24 & 25 Vict. c. 133, s. 16. As to injury from acts in excess of jurisdiction or from negligence, see *Pentney* v. *Lynn Paving Commissioners* (1865), 12 L. T. 818; *Coe* v. *Wise* (1866), L. R. 1 Q. B. 711, Ex. Ch.; *Collins* v. *Middle Level Commissioners* (1869), L. R. 4 C. P. 279; *Grocers' Co.* v. *Donne* (1836), 3 Scott, 356; *Clothier* v. *Webster* (1862), 31 L. J. (C. P.) 316.

procedure is to be the same as when lands are purchased or taken under the Lands Clauses Acts (*f*). Land may also be authorised to be taken by an order incorporating these Acts (*g*). Private owners are also given certain powers to obtain outfalls. This may be by arrangement with the adjoining owner, even if under disability, provision being made as to how his assent is to be obtained, the purchase-money being applied under the Lands Clauses Acts, and occupiers and persons other than the owners are to be entitled to compensation to be determined according to these Acts (*h*). If the owner dissents, power in certain cases may be obtained from justices or by arbitration. If power be granted, the justices or arbitrators assess the compensation, and apportion it; and if the owner is under disability, it is applied according to the Lands Clauses Acts (*i*).

SUB-SECT. 3.—*Signal Stations and Lighthouses.*

Purchase of land by Lloyd's.

271. Power to acquire land compulsorily for signal stations, telegraph stations and the like may be obtained by Lloyd's by provisional order (*k*). The Lands Clauses Acts are to be incorporated, except the provisions relating to access to the special Act and any provisions that are inconsistent or not applicable (*l*).

Lighthouses.

272. A general lighthouse authority is authorised to purchase any land necessary for the exercise of their lighthouse powers or for the residence of the light-keepers, and the Lands Clauses Acts apply thereto (*m*).

(*f*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 20
(*g*) *Ibid.*, ss. 21—32.
(*h*) *Ibid.*, ss. 72—74
(*i*) *Ibid.*, ss. 76, 77.
(*k*) Lloyd's Signal Stations Act, 1888 (51 & 52 Vict. c. 29).
(*l*) *Ibid.*, ss. 3, 4.
(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 638, 639. The general lighthouse authority in England and Wales is the Trinity House. See title SHIPPING AND NAVIGATION.

CONCEALMENT OF BIRTH.

See CRIMINAL LAW AND PROCEDURE.

CONDITION.

See CONTRACT; DEEDS AND OTHER INSTRUMENTS; WILLS.

CONDITIONS OF SALE.

See AUCTIONS AND AUCTIONEERS; SALE OF GOODS; SALE OF LAND.

CONFESSION AND AVOIDANCE.

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Part I.—Introductory.

SECT. 1.—*Subject-matter of Title.*

Nature of subject-matter.

273. The subject-matter of the branch of English law compendiously known as "Conflict of Laws" or "Private International Law" (*a*) consists of the rules adopted by the English courts for determining, first, the limits of their own jurisdiction in disputes which either wholly or in part arise abroad, or at least in connection with foreign transactions; and, secondly, if the matter falls within their jurisdiction, the law, whether English or foreign, which in the circumstances of the case it becomes their duty to apply (*b*).

Recognition of rights acquired abroad.

274. It may thus become the duty of the English courts in many cases to recognise, and give effect to, rights acquired under a foreign

(*a*) For a discussion of the various names given to this subject, see Holland, Jurisprudence, 10th ed., pp. 405 *et seq.* Professor Holland regards Conflict of Laws as the best, and Private International Law as "indubitably the worst," of them. The "extra-territorial recognition of rights," which Professor Holland himself suggests, is criticised by Dicey, Conflict of Laws, 2nd ed., p. 15, as a description rather than a name.

(*b*) The principles underlying the English conception of this subject are luminously discussed by Dicey, *op. cit.* pp. 1—66; see also Westlake, Private International Law, 4th ed., chapters 1, 2, 9, and 10.

system of law (*c*); and although foreign law as such can demand no recognition in England, yet for obvious reasons of convenience (*d*) it has long become a principle of English jurisprudence that in appropriate circumstances English law will stand aside and allow, *ex gratia*, certain disputes to be decided in its own courts according to the rules of some other body of law (*e*), which, it need hardly be said, the courts administering that other law could not themselves compel it to do. The principles, therefore, on which the English courts act in claiming or disclaiming jurisdiction in connection with rights acquired abroad, and in selecting the rules of law, English or foreign, which are to be made applicable to the circumstances before them, form the subject of this title. It is a subject which touches almost every branch of English law, and is accordingly dealt with under a variety of headings. Certain other topics which are in part concerned with the recognition accorded in England to rights acquired abroad, and to the effect to be given outside the jurisdiction of the English courts to rights acquired within it, such as bankruptcy, nationality, the administration of assets by executors and administrators, are discussed in other parts of this work, to which reference may be made (*f*).

SECT. 2.—*General Principles of Jurisdiction.*

Actions *in personam*.

275. The English courts have jurisdiction (subject to the exceptions referred to below) (*g*) to entertain an action *in personam* against any person who is within the jurisdiction at the time when the writ in the action is served upon him, however transitory his sojourn in England may be (*h*); and there are certain cases in which an action will be entertained against a person not within the jurisdiction, but in such cases leave must be obtained to serve the writ

(*c*) See *per* Lord HALSBURY in *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, C. A., at p. 335: "That one country will, under some circumstances, enforce contracts made in another, is a proposition I should have thought not requiring authority."

(*d*) Compare Holland, Jurisprudence, 10th ed., at p. 409: "When, on the other hand, the theory of 'comity' is attacked, on the ground that a court, in applying a particular 'lex,' is guided not by courtesy, but by legal principle, it must not be forgotten that, although the courts of each State are guided by the law of the State, the State, in making that law, is guided not by the law of nations, but by general considerations of equity, accompanied by some expectation of reciprocity."

(*e*) No better illustration of the working of this principle can be given than the judgment of Lord STOWELL in *Dalrymple* v. *Dalrymple* (1811), 2 Hag. Con. 54, at pp. 58, 59, a suit involving the decision as to a Scotch marriage: "The cause being entertained in an English court, it must be adjudicated upon according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England, is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland."

(*f*) See titles ADMIRALTY, Vol. I., p. 57; ALIENS, Vol. I., p. 301; BANKRUPTCY AND INSOLVENCY, Vol. II., p. 1; CRIMINAL LAW AND PROCEDURE; EVIDENCE; EXECUTORS AND ADMINISTRATORS; PRACTICE AND PROCEDURE.

(*g*) See the titles to which reference is made in preceding note, and titles ACTION, Vol. I., p. 1; COURTS.

(*h*) R. S. C., Ord. 1, r. 1, and see titles COURTS; PRACTICE AND PROCEDURE, for the jurisdiction of the English courts in general. The defendant's nationality is immaterial.

SECT. 2. General Principles of Jurisdiction.

abroad (*i*). Further, a person may agree, either expressly, or impliedly by his conduct, to submit to the jurisdiction of the English courts (*j*), but parties cannot agree to give the English courts a jurisdiction which they are by statute forbidden to exercise or for some other reason do not possess (*k*); so also, where the jurisdiction depends on domicil, a party by appearing and pleading cannot give the court a jurisdiction which it would not otherwise possess (*l*).

Movables and immovables.

276. Over immovables situate in England the English courts exercise exclusive jurisdiction (*m*); and they also have jurisdiction, though not necessarily an exclusive jurisdiction, so far as concerns rights in, or the title to, any movable situate in England (*n*).

Matrimonial causes.

277. In petitions for dissolution of marriage and other matrimonial causes, the jurisdiction of the English courts depends upon the domicil or residence of the parties to the suit, according to circumstances (*o*).

Foreign sovereigns etc.

278. On the other hand, the English courts have no jurisdiction against foreign sovereigns and diplomatic representatives of foreign sovereigns unless such persons submit to the jurisdiction (*p*), nor will they entertain an action, whether of contract or of tort (*q*), which involves directly or indirectly the question of title to foreign immovables, although in certain circumstances an action will lie in England respecting such foreign immovables where no question of title is concerned (*r*).

Penal and revenue cases.

279. No action lies in England to recover penalties imposed by the law of a foreign country (*s*), or to recover rates or taxes imposed by a foreign revenue law (*t*).

Part II.—Domicil.

SECT. 1.—*Nature of Domicil.*

Definition.

280. A person's domicil is that country in which he either has or is deemed by law to have his permanent home (*a*).

(*i*) R. S. C., Ord. 11, r. 1; and see title PRACTICE AND PROCEDURE for an account of the cases in which service out of the jurisdiction is permitted.

(*j*) See titles COURTS; PRACTICE AND PROCEDURE.

(*k*) *British Wagon Co.* v. *Gray*, [1896] 1 Q. B. 35, C. A.

(*l*) See *Armitage* v. *A.-G.*, *Gillig* v. *Gillig*, [1906] P. 135, *per* BARNES, P., at p. 140. It is necessary to distinguish between cases where there is a total absence of jurisdiction and cases where (as with ambassadors) only technical difficulties of procedure are an obstacle.

(*m*) See p. 199, *post*.

(*n*) See pp. 213, 281, *post*.

(*o*) See p. 262, *post*.

(*p*) See title ACTION, Vol. I., p. 1.

(*q*) *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602; and see p. 199, *post*.

(*r*) See p. 201, *post*.

(*s*) *Huntington* v. *Attrill*, [1893] A. C. 150, P. C. So also a penal status imposed by a foreign law, or a status of a kind not recognised by English law, will not be recognised as such in England (*Worms* v. *De Valdor* (1880), 49 L. J. (CH.) 261; *Re Selot's Trust*, [1902] 1 Ch. 488. See also p. 283, *post*.

(*t*) *Sydney Municipal Council* v. *Bull*, [1909] 1 K. B. 7.

(*a*) The difficulty of defining domicil is discussed in *Forbes* v. *Forbes* (1854),

SECT. 1. Nature of Domicil.

English law determines all questions in which it admits the operation of a personal law by the test of domicil (*b*). For this purpose it regards the organisation of the civilised world in civil societies, each of which consists of all those persons who live in any territorial area which is subject to one system of law, and not its organisation in political societies or States, each of which may either be co-extensive with a single legal system or may unite several systems under its own sovereignty (*c*). All those persons who have, or whom the law deems to have, their permanent home within the territorial limits of a single system of law are domiciled in the country over which the system extends; and they are domiciled in the whole of that country, although their home may be fixed at a particular spot within it (*d*).

Everyone has a domicil

Every person at birth becomes a member both of a political and of a civil society. The former determines his political status or nationality, on which depends his allegiance to a sovereign; the latter determines his civil status. This means that the law which governs the civil society into which he is born, the law of the country of his domicil, is attached to his person and remains so attached, wherever he goes, unless and until he ceases to be a member of that society; and this he can only do by becoming a member of another civil society, or changing his domicil, upon which the law of the new domicil becomes attached to him in the same manner (*e*).

Every person has a domicil at every period of his life, and no person has more than one domicil at one time (*f*).

Nature of domicil.

The relation created by domicil is one between a person and a locality, and never arises from membership of a community as distinguished from the country in which the community resides. But the municipal law of the country of domicil may itself distinguish between classes of its subjects, and apply different rules

Kay, 341; *Lord* v. *Colvin* (1859), 28 L. J. (CH.) 361; *A.-G.* v. *Rowe* (1862), 31 L. J. (EX.) 314; Dicey, Conflict of Laws, 2nd ed., p. 82, and Appendix, note 6. Domicil is generally identical with home, but whereas a person may have no home or more than one, the law requires him to have a domicil, and one only. Technical rules for its determination are therefore necessary; but as these rules are governed by different principles of legal policy or convenience, any definition of domicil which would include all the cases in which domicil and home are not identical must be either an enumeration or too vague to be practically useful.

The word "domicil" is occasionally, but inaccurately, used to express residence of a certain degree of permanence, but not attended by the circumstances necessary to produce a true domicil. See *M'Mullen* v. *Wadsworth* (1889), 14 App. Cas. 631; *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517. Domicil in the sense in which the word is used in private international law must also be distinguished from "commercial domicil" during war, for which see p. 195, *post*.

(*b*) See pp. 220, 233, 254, *post*. For domicil of corporations, see title CORPORATIONS.

(*c*) *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441, 457; *Bell* v. *Kennedy* (1868), L. R. 1 Sc. & Div. 307, 320.

(*d*) *Re Capdevielle* (1864), 33 L. J. (EX.) 306, *per* POLLOCK, C.B., at p. 316 (in dissenting judgment).

(*e*) *Udny* v. *Udny*, *supra*; *Bell* v. *Kennedy*, *supra*.

(*f*) *Somerville* v. *Somerville* (*Lord*) (1801), 5 Ves. 749; *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441; *Bell* v. *Kennedy* (1868), L. R. 1 Sc. & Div. 307; *Re Steer* (1858), 3 H. & N. 594.

SECT. 1. Nature of Domicil.

according to the caste or creed or other characteristic of a particular person, so that after the domicil has been ascertained it may be further necessary to inquire into the caste or creed to which a person belongs before the particular rule which is applicable to his case can be known. But this rule is none the less an integral part of the territorial law of the country of domicil (*g*).

SECT. 2.—*Determination of Domicil.*

SUB-SECT. 1.—*Kinds of Domicil.*

Domicil of origin and domicil of choice.

281. The law attributes to every person at birth a domicil which is called a domicil of origin. This domicil may be changed, and a new domicil, which is called a domicil of choice, acquired; but the two kinds of domicil differ in the following respects:—

The domicil of origin is received by operation of law at birth; the domicil of choice is acquired at a later date by the act of an individual (*h*).

The domicil of origin is retained until the acquisition of a domicil of choice, and cannot be divested by mere abandonment; the domicil of choice is lost by abandonment.

The domicil of origin is never destroyed, but only remains in abeyance during the continuance of a domicil of choice; the domicil of choice, when it is once lost, is destroyed for every purpose (*i*).

How domicil of origin is fixed.

The domicil of origin is determined by the domicil, at the time of the child's birth, of that person upon whom he is legally dependent. A legitimate child born in the lifetime of the father receives the domicil of the father at the time of the birth; a posthumous legitimate child or an illegitimate child receives that of the mother at that time. A foundling's domicil of origin is the country in which he is found (*k*).

(*g*) *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431; *Re Tootal's Trusts* (1883), 23 Ch. D. 532; *Maltass* v. *Maltass* (1844), 1 Rob. Eccl. 67; *Gout* v. *Zimmermann* (1847), 5 Notes of Cases, 440; and compare par. 291, on p. 190, *post*.

(*h*) The better view is that every domicil, not being that received at birth or a reversion to it, is a domicil of choice; but there is some authority for thinking that if the domicil is changed during infancy, the domicil of origin is that existing at majority. See, however, *Re Craignish*, *Craignish* v. *Hewitt*, [1892] 3 Ch. 180, C. A. where the point is discussed, but not determined, by CHITTY, J.; *Re Duleep Singh*, *Ex parte Cross* (1890), 7 Morr. 228, C. A., where LINDLEY, L.J., discusses the possibility of an English domicil of origin, though the domicil at majority was beyond question foreign; *Firebrace* v. *Firebrace* (1878), 4 P. D. 63, where a domicil in Australia, derived during infancy by the father's acquisition of a domicil there, is treated by HANNEN, P., as a domicil of choice; *Re Macreight*, *Paxton* v. *Macreight* (1885), 30 Ch. D. 165; and, *contra*, *Urquhart* v. *Butterfield* (1887), 37 Ch. D. 357, C. A., where LOPES, L.J., at p. 385, states that the domicil of origin is the domicil at majority, but the point in question did not arise.

(*i*) *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441; *Bell* v. *Kennedy* (1868), L. R. 1 Sc. & Div. 307; *Somerville* v. *Somerville* (*Lord*) (1801), 5 Ves. 749; *Munro* v. *Munro* (1840), 7 Cl. & Fin. 842, 876, H. L.; *Aikman* v. *Aikman* (1861), 3 Macq. 854, 863, 877, H. L.; *Re Marrett*, *Chalmers* v. *Wingfield* (1887), 36 Ch. D. 400, C. A.

(*k*) *Udny* v. *Udny*, *supra*; *Forbes* v. *Forbes* (1854), Kay, 341; *Van Matre* v. *Sankey* (1893), 39 American State Reports, 196 (posthumous child); *Urquhart* v. *Butterfield* (1887), 37 Ch. D. 357, C. A. (illegitimate child). Where the parents are known the place of birth is immaterial (*Somerville* v. *Somerville* (*Lord*), *supra*, at p. 786). Presence in a place is *primâ facie*

SECT. 2. Determination of Domicil.

Any person not under disability may at any time change his existing domicil and acquire for himself a domicil of choice by residing in a country other than that of his domicil of origin with the intention of continuing to reside there for an indefinite time (*l*).

Change of domicil.

For this purpose residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material (*m*).

The state of mind, or *animus manendi*, is that a person should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or, in effect, a deliberate intention to settle there. As no man can have more than one domicil at a time, an intention to retain a permanent home in the old domicil is necessarily excluded; and as the new home must be regarded as the permanent future home, there must not be in contemplation any event upon the occurrence of which residence in the new country will be brought to an end (*n*).

SUB-SECT. 2.—*Change of Domicil by Persons not under Disability.*

Presumption against change.

282. The presumption of law is always against a change of domicil, which must in every case be proved with perfect clearness by the person alleging it (*o*).

Content of *animus manendi*.

283. It is not necessary that a change of nationality should be intended, or that any steps should be taken to secure naturalisation in the new domicil, even if naturalisation is possible (*p*). Nor is it

evidence of domicil, and in the case of a foundling it is the only evidence obtainable (*Bempde* v. *Johnstone* (1796), 3 Ves. 198).

(*l*) *Winans* v. *A.-G.*, [1904] A. C. 287; *Huntly* (*Marchioness*) v. *Gaskell*, [1906] A. C. 56; *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441; *Bell* v. *Kennedy* (1868), L. R. 1 Sc. & Div. 307.

(*m*) *Bell* v. *Kennedy*, *supra*, *per* Lord CHELMSFORD, at p. 319.

(*n*) *Moorhouse* v. *Lord* (1863), 10 H. L. Cas. 272, *per* Lord CHELMSFORD, at p. 285; *Pitt* v. *Pitt* (1864), 4 Macq. 627, 643, H. L.; *Aikman* v. *Aikman* (1861), 3 Macq. 854, H. L., *per* Lord WENSLEYDALE, at p. 882; *Goulder* v. *Goulder*, [1892] P. 240; *Re Martin*, *Loustalan* v. *Loustalan*, [1900] P. 211, C. A. It was formerly held that a domicil might be acquired if the intention to abandon residence was very remote, a mere "floating" intention to return, *e.g.*, after making a fortune (*Doucet* v. *Geoghegan* (1878), 9 Ch. D. 441, C. A.; *Re Capdevielle* (1864), 33 L. J. (EX.) 306, 312). Probably such a state of mind is inconsistent with the final and deliberate intention to settle which is required by *Winans* v. *A.-G.*, [1904] A. C. 287 And see *Re James*, *James* v. *James* (1908), 98 L. T. 438.

(*o*) *Winans* v. *A.-G.*, *supra*; *The Lauderdale Peerage* (1885), 10 App. Cas. 692; *Aikman* v. *Aikman* (1861), 3 Macq. 854, H. L.

(*p*) *Udny* v. *Udny*, *supra*, *per* HATHERLEY, C., at p. 452, and *per* Lord WESTBURY, at pp. 457—460; *Haldane* v. *Eckford* (1869), L. R. 8 Eq. 631; *Douglas* v. *Douglas* (1871), L. R. 12 Eq. 617; *Winans* v. *A.-G.*, *supra*, *per* Lord LINDLEY, at p. 299. See *contra Whicker* v. *Hume* (1858), 7 H. L. Cas. 124, *per* Lord CRANWORTH, at p. 159; *Moorhouse* v. *Lord* (1863), 10 H. L. Cas. 272, *per* Lord CRANWORTH, at p. 283, and *per* Lord KINGSDOWN, at p. 292. The *dicta* in these cases were interpreted as requiring an intention to change the political status (*Re Capdevielle* (1864), 33 L. J. (EX.) 306; *A.-G.* v. *De Wahlstatt* (*Count and Countess*) (1864), 34 L. J. (EX.) 29; *Drevon* v. *Drevon* (1864), 34 L. J. (CH.) 129); but they do not necessarily bear that meaning (*Brooks* v. *Brooks' Trustees* (1902), 4 F. (Ct. of Sess.) 1014, *per* Lord KINNEAR, at p. 1043; *Huntly* (*Marchioness*) v. *Gaskell*, *supra*, *per* Lord HALSBURY, L.C.,

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necessary that a person should realise the legal result of his conduct, or intend to change his civil status. If residence and the intention that it shall be permanent are both present, a domicil is acquired even in the face of express declarations of a desire to retain the old domicil (*q*).

Domicil in non-Christian country.

Where, however, the subject of a Christian power resides in a country which is not under Christian government, there is authority for saying that he cannot acquire a domicil there merely by the determination to make it his permanent home; he must also intend to make himself a member of the civil society of the non-Christian country, and manifest this intention by adopting its manner of life (*r*). This exception to the general rule does not extend to countries which, though Oriental, are under Christian government (*s*).

Inception of intention.

The intention to make the residence permanent need not be in existence at the first arrival in the country where a domicil of choice is alleged to have been acquired; it may be, and often is, formed after residence has been continued for some time. The acquisition of a domicil is complete as soon as this change of purpose has taken place; and no subsequent change of purpose, or doubts arising as to the wisdom of the determination, can affect the domicil so acquired (*t*).

Motive of residence immaterial.

The motive of residence is only important in so far as its character may throw light on the whole state of mind and be evidence of the existence or non-existence of the necessary intention (*u*).

The determination must be to settle in a particular country, and not necessarily at a particular place; but the absence of a fixed residence is important as evidence, and may be sufficient

at p. 66, in which case no question of allegiance could possibly arise, the question being between a Scotch and an English domicil).

(*q*) *Re Steer* (1858), 3 H. & N. 594; *D'Etchegoyen* v. *D'Etchegoyen* (1888), 13 P. D. 132, 134; *Re Garden* (1895), 11 T. L. R. 167.

(*r*) *Re Tootal's Trusts* (1883), 23 Ch. D. 532, 534, where an intention to reside permanently at Shanghai was proved, but CHITTY, J., held that no domicil was thereby acquired. This case was approved generally in *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431, 441, but the possibility of a non-Christian domicil did not there arise. In *Abdallah* v. *Rickards* (1888), 4 T. L. R. 622, CHITTY, J., admitted the possibility of an Ottoman domicil having been acquired by an Englishman who had identified himself with the religion and customs of the Ottoman empire. See also *Maltass* v. *Maltass* (1844), 1 Rob. Eccl. 67, 80. It is submitted that, notwithstanding some of the remarks of the learned judge in *Re Tootal's Trusts* (*supra*), the question is one of evidence, and that non-Christian countries form no exception to the general rule as regards the content of the *animus manendi*. It is probably impossible to acquire a domicil in an uncivilised country. Compare Dicey's Conflict of Laws, 2nd ed., Appendix, note 2.

(*s*) *Lord Advocate* v. *Brown's Trustees*, [1907] S. C. 333 (Ceylon).

(*t*) *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441, *per* Lord WESTBURY, at p. 458; *Re Marrett*, *Chalmers* v. *Wingfield* (1887), 36 Ch. D. 400, C. A. Such doubts may, however, add to the difficulty of showing that a fixed intention ever really existed.

(*u*) *Re Cooke's Trusts* (1887), 56 L. J. (CH.) 637; *Fairbairn* v. *Neville* (1897), 25 R. (Ct. of Sess.) 192, 203; *King* v. *Foxwell* (1876), 3 Ch. D. 518. When it is said that the residence must be "freely chosen," or "voluntary" (*Udny* v. *Udny*, *supra*), it is meant that the circumstances by which it is attended must be of such a nature as to allow an intention of some kind regarding it to be formed.

to show that a final decision with regard to the country has not been reached (*a*).

SUB-SECT. 3.—*Evidence of Change of Domicil.*

284. Any act, event, or circumstance in the life of an individual may be evidence from which the state of his mind may be inferred with more or less precision; and it is impossible to formulate any general rule by which the weight due to any particular point of evidence may be determined. Not only does the strength of the evidence from which the intention may be inferred vary according to the inherent probability or improbability of an alleged change of domicil, but the importance of similar facts may differ absolutely in different cases. The age, character, and general circumstances of the man himself, and the climate, religion, and customs of the country in which the domicil is alleged to have been acquired, are considerations which may cause the value of a particular fact to vary almost indefinitely. On the one hand, the intention must be clearly and unequivocally proved; but, on the other hand, it is unreasonable to require it to be proved by evidence which the person whose domicil is in question might not fairly be expected to have furnished, if he had, in fact, formed the intention (*b*).

Weight of evidence.

Direct evidence of intention is rarely accessible, but a person whose domicil is in question may himself give evidence of his intentions, present or past. Evidence of this nature is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness (*c*).

Direct evidence.

Expressions of intention, written or oral, may be given in evidence, but such evidence must be carefully weighed in connection with the context in which it occurred, and even if the expressions are clear and consistent they cannot prevail against a course of conduct leading to an opposite inference (*d*).

Secondary evidence.

285. Residence itself raises a presumption of intention to reside in the same place, which is increased when the residence is continued for a long period, and may even be conclusive in the absence

Residence as evidence.

(*a*) *Bell* v. *Kennedy* (1868), L. R. 1 Sc. & Div. 307; *Aikman* v. *Aikman* (1861), 3 Macq. 854, 881, H. L.; *Re Patience, Patience* v. *Main* (1885), 29 Ch. D. 976; *Re Eschmann* (1893), 9 T. L. R. 426; *contra, A.-G.* v. *Dunn* (1840), 6 M. & W. 511, where, however, the court held that no final decision had been made as to the country.

(*b*) *Sharpe* v. *Crispin* (1869), L. R. 1 P. & D. 611, 619; *Hoskins* v. *Matthews* (1856), 8 De G. M. & G. 13, 16, C. A.; *Drevon* v. *Drevon* (1864), 34 L. J. (CH.) 129. Conduct subsequent to the time at which it is material to determine the state of mind may be regarded (*Re Grove, Vaucher* v. *Solicitor to the Treasury* (1888), 40 Ch. D. 216, C. A.). In considering whether domicil has been changed after majority, the court is reluctant to consider conduct during minority (*Re Duleep Singh, Ex parte Cross* (1890), 7 Morr. 228, C. A.); but see *Spurway* v. *Spurway*, [1894] 1 I. R. 385, C. A.

(*c*) *Bell* v. *Kennedy, supra, per* CAIRNS, C., at p. 313; *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441; *Wilson* v. *Wilson* (1872), L. R. 2 P. & D. 435, *per* Lord PENZANCE, at p. 444; *Re Craignish, Craignish* v. *Hewitt*, [1892] 3 Ch. 180, C. A., *per* CHITTY, J., at p. 190; *Maxwell* v. *McClure* (1860), 3 Macq. 852, H. L.

(*d*) *Munro* v. *Munro* (1840), 7 Cl. & Fin. 842, H. L.; *Hoskins* v. *Matthews* (1856), 8 De G. M. & G. 13, 30, C. A.; *Hodgson* v. *De Beauchesne* (1858), 12 Moo. P. C. C. 285, 325; *Crookenden* v. *Fuller* (1859), 1 Sw. & Tr. 441, 450; *Drevon* v. *Drevon, supra; Doucet* v. *Geoghegan* (1878), 9 Ch. D. 441, 455, C. A.

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of explanatory circumstances. But though a long residence, except in certain special cases, is always material as evidence, it is never essential, and very rarely decisive, for slight circumstances may serve to show the absence of a settled intention (*e*).

Residence under special circumstances.

The special circumstances of residence may render its duration entirely immaterial. Thus, an ambassador or consul acquires no domicil in the country in which he resides for the purpose of his office, that purpose being in its nature temporary; but if he already has a domicil in that country, he does not lose it by accepting the appointment (*f*). A prisoner or person under physical restraint is incapable of forming an intention of any kind regarding his place of residence, and accordingly retains unaffected the domicil which he had at the time when his detention began (*g*). An exile is not prevented from forming an intention with regard to his residence, but as he usually intends to return to his own country when allowed to do so, strong evidence is required to show that a domicil has been gained in the country of residence (*h*).

For reasons of health.

The acquisition of a domicil of choice is not necessarily prevented by the fact that residence has been established owing to reasons of health; but the state of health may be evidence according to circumstances to show that the intention to settle either does or does not exist. The question in these cases is not whether a person would prefer under different circumstances to live elsewhere, but what is his present intention with regard to his actual residence. If he has, however reluctantly, formed a fixed determination to make his home in the place of residence, a domicil is acquired; but if he has not, then, even though he may expect to die there, no domicil is acquired (*i*).

Moral pressure.

Similar considerations apply to other cases where moral pressure is brought to bear on the choice of a place of residence. The existence of such pressure is never decisive in itself, but must be considered only in its probable effect on the state of mind of its subject (*j*).

(*e*) *Bempde* v. *Johnstone* (1796), 3 Ves. 198; *Bruce* v. *Bruce* (1790), 2 Bos. & P. 229, n., H. L.; *Re Grove, Vaucher* v. *Solicitor to the Treasury* (1887), 40 Ch. D. 216, C. A.; *Hodgson* v. *De Beauchesne* (1858), 12 Moo. P. C. C. 285, 329; *Lord Advocate* v. *Brown's Trustees*, [1907] S. C. 333, 340; and contrast the effect of time in the acquisition of a commercial domicil in *The Harmony* (1800), 2 Ch. Rob. 322; and see p. 195, *post*. A domicil was held not to have been acquired by a very long residence, notwithstanding a dearth of other evidence, in *Winans* v. *A.-G.*, [1904] A. C. 287, and *Re Patience, Patience* v. *Main* (1885), 29 Ch. D. 976.

(*f*) *Maltass* v. *Maltass* (1844), 1 Rob. Eccl. 67; *Gout* v. *Zimmermann* (1847), 5 Notes of Cases, 440; *Heath* v. *Samson* (1851), 14 Beav. 441; *A.-G.* v. *Kent* (1862), 31 L. J. (EX.) 391; *Sharpe* v. *Crispin* (1869), L. R. 1 P. & D. 611; *Re De Almeda (Baron), Sourdis* v. *Keyser* (1902), 18 T. L. R. 414, C. A.

(*g*) *Burton* v. *Fisher* (1821), Milw. 183; *Re Duleep Singh, Ex parte Cross* (1890), 7 Morr. 228, C. A.

(*h*) *De Bonneval* v. *De Bonneval* (1838), 1 Curt. 856; *Re D'Orléans (Duchess)* (1859), 1 Sw. & Tr. 253; *Charitable Donations Commissioners* v. *Devereux* (1842), 13 Sim. 14.

(*i*) *Hoskins* v. *Matthews* (1856), 8 De G. M. & G. 13, C. A.; *Aitchison* v. *Dixon* (1870), L. R. 10 Eq. 589 (where a domicil was acquired); *A.-G.* v. *Fitzgerald* (1856), 3 Drew. 610; *The Lauderdale Peerage* (1885), 10 App. Cas. 692, 740; *Gillis* v. *Gillis* (1874), I. R. 8 Eq. 597 (where a domicil was not acquired); *Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, *per* Lord CAMPBELL, at p. 139, H. L. See also *Re James, James* v. *James* (1908), 98 L. T. 438 (domicil not acquired).

(*j*) *Briggs* v. *Briggs* (1880), 5 P. D. 163; *Pitt* v. *Pitt* (1864), 4 Macq. 627, H. L.,

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Crown servants.

286. A British subject, in whatever part of the Empire he may be domiciled, does not lose his existing domicil by entering into the military, naval, or civil service of the Crown, and that domicil remains unchanged into whatever part of the world his duties may take him; but this statement is subject to the qualification that if clear proof of an intention to settle can be derived from other circumstances a domicil may be acquired (*k*).

Service under alien State.

287. On the other hand, a British subject entering the service of a foreign power, and a foreigner entering the service of the British Crown, acquire in general a domicil in the State by which they are employed; and where that State comprises more than one system of law, a domicil is acquired in that part of the State where the individual resides. The change of domicil in these cases results not from entering the service of the power in question, but from residence under circumstances showing an intention of permanence (*l*).

Double residence.

288. Where a man has more than one place of residence, but establishes the home of his wife and family in a particular place, a presumption arises in favour of his domicil in that place (*m*). Similarly, where of two residences one is a country and the other a town house, there is a slight presumption that a nobleman or gentleman is domiciled in the place of his country house, a merchant in the place of his town house (*n*).

Peers.

289. There is possibly a slight presumption against the acquisition of a foreign domicil by a peer of Parliament, but he is not prevented from changing his domicil by the duties of his rank (*o*).

where the object was to avoid creditors, and no change of domicil took place; *Re Robertson* (1885), 2 T. L. R. 178, C. A., where the object was the same, but a domicil of choice was held to have been abandoned; *Re Martin, Loustalan* v. *Loustalan*, [1900] P. 211, C. A., where a Frenchman residing in England for the purpose of avoiding a prosecution in France was held by RIGBY and VAUGHAN WILLIAMS, L.JJ., to have acquired, and by LINDLEY, M.R., and JEUNE, P., not to have acquired, an English domicil.

(*k*) *Re Mitchell, Ex parte Cunningham* (1884), 13 Q. B. D. 418, C. A.; *Re Macreight, Paxton* v. *Macreight* (1885), 30 Ch. D. 165; *Firebrace* v. *Firebrace* (1878), 4 P. D. 63; *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574; *A.-G.* v. *Napier* (1851), 6 Exch. 217 (army); *Brown* v. *Smith* (1852), 21 L. J. (CH.) 356; *Re Patten* (1860), 6 Jur. (N. S.) 151 (navy); *A.-G.* v. *Pottinger* (*Bart.*) (1861), 30 L. J. (EX.) 284 (colonial governor); *A.-G.* v. *Rowe* (1862), 31 L. J. (EX.) 314 (colonial judge); *Douglas* v. *Douglas* (1871), L. R. 12 Eq. 617 (Scotchman employed in the Home Office). An intention to settle was proved in *Re Smith* (1850), 2 Rob. Eccl. 332, and *Fairbairn* v. *Neville* (1897), 25 R. (Ct. of Sess.) 192. See also *The Lauderdale Peerage* (1885), 10 App. Cas., *per* Lord SELBORNE, L.C., at p. 739, and *Re Duleep Singh, Ex parte Cross* (1890), 7 Morr. 228, C. A.

(*l*) *Re Mitchell, Ex parte Cunningham* (1884), 13 Q. B. D. 418, C. A. The case of composite States like the British Empire raises a difficulty which has not been settled by decision; see, however, the judgment of COTTON, L.J., in this case. *President of U.S.A.* v. *Drummond* (1864), 33 Beav. 449; *Urquhart* v. *Butterfield* (1887), 37 Ch. D. 357, 382, C. A.

(*m*) *Forbes* v. *Forbes* (1854), Kay, 341; *Haldane* v. *Eckford* (1869), L. R. 8 Eq. 631; *Platt* v. *A.-G. of New South Wales* (1878), 3 App. Cas. 336; *D'Etchegoyen* v. *D'Etchegoyen* (1888), 13 P. D. 132; *Re Bullen-Smith, Berners* v. *Bullen-Smith* (1888), 58 L. T. 578. This presumption may, of course, be rebutted (*Douglas* v. *Douglas* (1871), L. R. 12 Eq. 617, 647).

(*n*) *Somerville* v. *Somerville* (*Lord*) (1801), 5 Ves 750, 788.

(*o*) *Hamilton* v. *Dallas* (1875), 1 Ch. D. 257.

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Other evidence.

290. Among minor circumstances which have been regarded as throwing light on the question of intention are the following: description in wills and other legal instruments (*p*)—the form or contents of the same (*q*); the purchase, sale, or ownership of land (*r*); the purchase or sale of a grave (*s*); prospects of succeeding to a title or estate (*t*); change of nationality or religion (*a*); education, marriage, or settlement in life of children (*b*); adoption of a new name, or a new way of spelling a name (*c*); and avoidance of society in the country of residence (*d*).

SUB-SECT. 4.—*Anglo-Indian Domicil.*

Anglo-Indians.

291. An exception to the ordinary rules governing the acquisition of a domicil of choice formerly existed in the case of British subjects in the service of the East India Company residing in India for a period of service that was not fixed. The government of the Company was regarded as a foreign government, and entry into its service as imposing a duty which was incompatible with the retention of an existing domicil; and a presumption, which was not allowed to be rebutted, was raised in favour of an intention consistent with this duty. An Indian domicil was therefore acquired by mere residence in India under these conditions, without regard to the actual state of mind accompanying it, and in spite of the fact that the majority of the Company's servants definitely looked forward to their return. This anomalous domicil has never been acquired by the servants of the Crown in India, and since 1858 the mode in which an Indian domicil is acquired has ceased to be exceptional (*e*).

(*p*) *A.-G.* v. *Fitzgerald* (1856), 3 Drew. 610; *A.-G.* v. *Pottinger* (*Bart.*) (1861), 30 L. J. (EX.) 284; *Capdeville* v. *Capdeville* (1869), 18 W. R. 107; *Drevon* v. *Drevon* (1864), 34 L. J. (CH.) 129; *A.-G.* v. *Dunn* (1840), 6 M. & W. 511.

(*q*) *Re Craignish, Craignish* v. *Hewitt*, [1892] 3 Ch. 180; *Haldane* v. *Eckford* (1869), L. R. 8 Eq. 631; *Heath* v. *Samson* (1851), 14 Beav. 441; *Doucet* v. *Geoghegan* (1878), 9 Ch. D. 441, C. A. Special weight attaches to evidence of this nature when the validity of an instrument is dependent on the domicil.

(*r*) *Moorhouse* v. *Lord* (1863), 10 H. L. Cas. 272, 288; *Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, 92, H. L.; *D'Etchegoyen* v. *D'Etchegoyen* (1888), 13 P. D. 132; *A.-G.* v. *Dunn* (1840), 6 M. & W. 511.

(*s*) *Brunel* v. *Brunel* (1871), L. R. 12 Eq. 298; *Stevenson* v. *Masson* (1873), L. R. 17 Eq. 78.

(*t*) *Pitt* v. *Pitt* (1864), 4 Macq. 627, 643, H. L.; *Aikman* v. *Aikman* (1861), 3 Macq. 854, H. L.; *Douglas* v. *Douglas* (1871), L. R. 12 Eq. 617, 640.

(*a*) *Stanley* v. *Bernes* (1830), 3 Hag. Ecc. 373; *Abdallah* v. *Rickards* (1888), 4 T. L. R. 622.

(*b*) *Stevenson* v. *Masson* (1873), L. R. 17 Eq. 78; *President of U.S.A.* v. *Drummond* (1864), 33 Beav. 449; *Doucet* v. *Geoghegan* (1878), 9 Ch. D. 441, C. A.

(*c*) *Re Martin, Loustalan* v. *Loustalan*, [1900] P. 211, C. A.; *Drevon* v. *Drevon* (1864), 34 L. J. (CH.) 129.

(*d*) *Winans* v. *A.-G.*, [1904] A. C. 287; *Re Patience, Patience* v. *Main* (1885), 29 Ch. D. 976. And see *Drevon* v. *Drevon*, *supra*, for other circumstances.

(*e*) The municipal law of India applicable to British residents being in most respects identical with English law, the domicil in question is referred to as Anglo-Indian. It may still be important at the present day where a question depends on the domicil of a servant of the Company. The foundation of the rule is explained in *Marsh* v. *Hutchinson* (1800), 2 Bos. & P. 226, *per* Lord

SUB-SECT. 5.—*Change of Domicil by Persons under Disability.* SECT. 2. Determination of Domicil.

292. The domicil of an infant cannot be changed by any act of his own, but it may, in some cases, be changed by the act of the person on whom he is dependent (*f*). Infants.

The domicil of a legitimate or legitimated infant follows any change in the domicil of the father, if living (*g*).

If the father is dead, the infant's domicil does not necessarily follow a change in the mother's, but whenever the mother changes her own domicil she may change that of the infant. The exercise of this power is only effectual where it is for the benefit of the infant that his domicil should be changed; and the power cannot be exercised where the infant is a ward of court residing out of the jurisdiction by permission. It is not lost by the mother's remarriage (*h*).

The mother of an illegitimate infant has the same power of changing his domicil when she changes her own (*i*). If an illegitimate infant is legitimated he takes the domicil of his father. A guardian has probably no power to change the domicil of his ward (*k*).

293. A woman acquires the domicil of her husband on marriage, and during the existence of the marriage the domicil of the wife Married women.

ELDON, at p. 231, citing and explaining *Bruce* v. *Bruce* (1790), H. L., reported in the note to that case; *Forbes* v. *Forbes* (1854), Kay, 341, 356; *Jopp* v. *Wood* (1865), 34 L. J. (CH.) 212, C. A.; *Re Mitchell, Ex parte Cunningham* (1884), 13 Q. B. D. 418, C. A. It was applied in *Munroe* v. *Douglas* (1820), 5 Madd. 379; *Craigie* v. *Lewin* (1843), 3 Curt. 435; *Hodgson* v. *De Beauchesne* (1858), 12 Moo. P. C. C. 285; *Hepburn* v. *Skirving* (1861), 9 W. R. 764; *Moorhouse* v. *Lord* (1863), 10 H. L. Cas. 272, 281. It did not extend to traders (*Jopp* v. *Wood, supra, per* ROMILLY, M.R., at p. 217); but see, *contra, Lyall* v. *Paton* (1856), 25 L. J. (CH.) 746, and *Allardice* v. *Onslow* (1864), 33 L. J. (CH.) 434; nor to the service of the Crown in India (*A.-G.* v. *Napier* (1851), 6 Exch. 217). In *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431, Lord WATSON speaks of the Anglo-Indian domicil as still existing, but nothing in that case implies that the anomalous rule governing its acquisition is still in force. That this is not so since the Government of India Act, 1858 (21 & 22 Vict. c. 106), appears from *Re Mitchell, Ex parte Cunningham, supra.* An Anglo-Indian domicil might, of course, always be acquired in the ordinary way (*Cockrell* v. *Cockrell* (1856), 25 L. J. (CH.) 730).

(*f*) *Somerville* v. *Somerville* (*Lord*) (1801), 5 Ves. 750, *per* ARDEN, M.R., at p. 787; *Forbes* v. *Forbes, supra, per* PAGE WOOD, V.-C., at p. 353; *Re Macreight, Paxton* v. *Macreight* (1885), 30 Ch. D. 165. It has been suggested that an infant engaging in trade may acquire a domicil for himself (*Stephens* v. *M'Farland* (1845), 8 I. Eq. R. 444). *Sed quære.*

(*g*) *Sharpe* v. *Crispin* (1869), L. R. 1 P. & D. 611, *per* WILDE, J., at p. 617; *D'Etchegoyen* v. *D'Etchegoyen* (1888), 13 P. D. 132; *Re Patten* (1860), 6 Jur. (N. S.) 151

(*h*) *Potinger* v. *Wightman* (1817), 3 Mer. 67; *Re Beaumont*, [1893] 3 Ch. 490; *Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, H. L., *per* Lord CAMPBELL, at pp. 138, 139.

(*i*) It is submitted that the grounds on which STIRLING, J., based his decision in *Re Beaumont, supra*, apply with equal force to the case of an illegitimate child.

(*k*) As to a guardian, see *Douglas* v. *Douglas* (1871), L. R. 12 Eq. 617, *per* WICKENS, V.-C., at p. 625; and compare *Urquhart* v. *Butterfield* (1887), 37 Ch. D. 357, C. A. (where the domicil of origin was not changed by an illegitimate infant residing for eleven years with the family of his putative father).

SECT. 2. Determination of Domicil.

follows that of the husband (*l*). A decree of judicial separation, but *semble* no other event during marriage, renders the wife capable of acquiring an independent domicil (*m*).

On the dissolution of the marriage by the death of the husband, or by divorce *a vinculo*, the power of the wife to acquire a domicil for herself revives; but until she exercises the power her domicil remains that of the husband at the time the marriage was dissolved (*n*).

Lunatics.

294. The domicil of a lunatic cannot be changed, either by his own act or by the act of the person having the custody of the lunatic. There is a possible exception to this rule where the mental incapacity begins during infancy, so that minority is never succeeded by adult capacity; under these circumstances the domicil of a lunatic continues to follow that of the father (*o*).

(*l*) *Re Daly's Settlement* (1858), 25 Beav. 456; *Harvey* v. *Farnie* (1882), 8 App. Cas. 43. The wife acquires the husband's domicil if she lives with him in the country of his domicil, not only by construction of law, but also as a matter of fact (*Turner* v. *Thompson* (1888), 13 P. D. 37, *per* HANNEN, P., at p. 41). In that case a domiciled Englishwoman marrying in England a domiciled American and residing with him in America, was held to have acquired an American domicil although the marriage was originally voidable at English law).

(*m*) "The doctrine that the domicil of the wife is necessarily that of the husband is founded on the duty of the wife to live with her husband, but also on the presumption that he will be faithful to his marriage vow" (*Le Sueur* v. *Le Sueur* (1876), 1 P. D. 139, 141). Applying this reasoning, Sir R. J. PHILLIMORE expressed the opinion that after the husband's desertion the wife may acquire an independent domicil; and see *Dolphin* v. *Robins* (1859), 7 H. L. Cas. 390, *per* Lord CRANWORTH, at pp. 416—419. It is apprehended that the effect of the husband's lunacy is equally doubtful. In the same case Lord KINGSDOWN, at p. 420, doubted whether even a decree of judicial separation would render the wife capable of acquiring an independent domicil. In *Williams* v. *Dormer* (1852), 2 Rob. Eccl. 505, it was held that a wife might change her domicil after divorce *a mensa et thoro*. It is certain that a mere agreement of separation (*Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488, 528, H. L.), the husband's misconduct (*Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574), or a *bonâ fide* belief in his death (*Re Cooke's Trusts* (1887), 56 L. J. (CH.) 637), do not give capacity to the wife to acquire an independent domicil.

In certain special circumstances a wife may be allowed to maintain a suit for divorce in the courts of this country although her husband is not domiciled here. Thus, she may be allowed to do so when she has been deserted by her husband or has separated from him for justifiable cause, provided that at the time when the desertion or separation took place the husband was domiciled within the jurisdiction (*Armytage* v. *Armytage*, [1898] P. 178, 185; *Pitt* v. *Pitt* (1864), 4 Macq. 627, 640, H. L.). This does not depend, at all events, necessarily, on the ground that the wife can acquire a separate domicil, but, rather, on the ground that the husband will not, under the circumstances, be allowed to rely on his new domicil. It was suggested by the court in *Ogden* v. *Ogden*, [1908] P. 46, C. A., at p. 82, that if the country of the husband's domicil refuses to recognise a marriage, and therefore will not entertain a suit for divorce against him, a wife who has been left in the country of her original domicil where the marriage was celebrated, and where it is recognised as binding upon both her and him, may be treated as having a domicil in her own country which will be sufficient to support a suit. See p. 263, *post*.

(*n*) *Gout* v. *Zimmermann* (1847), 5 Notes of Cases, 440.

(*o*) *Sharpe* v. *Crispin* (1869), L. R. 1 P. & D. 611 (Sir J. P. WILDE did not definitely decide in favour of the exception suggested); *Urquhart* v. *Butterfield* (1887), 37 Ch. D. 357, 382; *Hepburn* v. *Skirving* (1861), 9 W. R. 764. In *Bempde* v. *Johnstone* (1796), 3 Ves. 198, at p. 201, Lord LOUGHBOROUGH doubted

SUB-SECT. 6.—*Abandonment of Domicil of Choice.*

SECT. 2. Determination of Domicil.

Abandonment.

295. A domicil of choice continues until it is abandoned; it may be retained by residence alone, although an intention to abandon it has been formed, or by an intention to return, although the residence has been temporarily interrupted.

It is divested only when the country of domicil has been actually abandoned with the intention of abandoning it for ever; but when this process, which is the exact converse of the process of its acquisition, is complete, it ceases for every purpose. It is never necessary that another domicil should be acquired; but in two cases the abandonment of one domicil of choice and the acquisition of another may coincide in point of time; the first being where the old and the new domicils adjoin, so that the same act may constitute the act of abandoning the old and of residence in the new; the second where the intention to abandon the old and to settle in the new supervenes on an actual residence in the new domicil (*p*).

In every other case the domicil of origin is automatically called out of abeyance and again becomes effective, even though it may only be required for the period of a journey from one domicil of choice to another (*q*).

SECT. 3.—*Statutory Regulation of Domicil.*

SUB-SECT. 1.—*Domicil not recognised by Foreign Law.*

Recognition of domicil by foreign law.

296. There is some authority for saying that no domicil can be acquired in a country whose municipal law determines civil status by reference to the principle of nationality and not to that of domicil; and that where this is found to be the case in a country where a domicil would in ordinary circumstances be held to have been acquired, the previous domicil, if one of origin, remains unaffected, or if one of choice, is abandoned and the domicil of origin reverts (*a*). It is submitted, however, that an English court

whether a period of lunacy was to be entirely disregarded; but it is submitted that the question must now be answered in the affirmative.

(*p*) *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441; *Re Marrett, Chalmers* v. *Wingfield* (1887), 36 Ch. D. 400, C. A.; *Urquhart* v. *Butterfield* (1887), 37 Ch. D. 357, C. A.; *Re Bianchi* (1862), 3 Sw. & Tr. 16; *King* v. *Foxwell* (1876), 3 Ch. D. 518. Absence without the intention of abandonment is of no effect (*Craigie* v. *Lewin* (1843), 3 Curt. 435; *Bradford* v. *Young* (1885), 29 Ch. D. 617, C. A.); nor is intention without the act of abandonment (*Re Raffenel* (1863), 3 Sw. & Tr. 49).

(*q*) *Lyall* v. *Paton* (1856), 25 L. J. (CH.) 746, *per* KINDERSLEY, V.-C., explaining a *dictum* in *Munroe* v. *Douglas* (1820), 5 Madd. 379, at p. 405, which was understood as laying down that during a journey from one domicil of choice to another the domicil is that of the intended place of residence, and was cited in that sense without comment by PAGE WOOD, V.-C., in *Forbes* v. *Forbes* (1854), Kay, 341, at p. 353. The rule supposed to have been laid down in *Munroe* v. *Douglas, supra*, would render the acquisition of a domicil of choice possible without the existence of the *factum;* but the case was overruled generally by *Udny* v. *Udny, supra*, at p. 453.

(*a*) *Re Johnson, Roberts* v. *A.-G.*, [1903] 1 Ch. 821. "The propositus intended but failed to obtain an effectual domicil of choice the factum cannot exist where the law refuses to recognise it. Such a domicil of choice is no domicil at all" (*per* FARWELL, J., at p. 828). This case was approved by SWINFEN EADY, J., in *Re Bowes, Bates* v. *Wengel* (1906), 22 T. L. R. 711. See p. 220, *post.*

SECT. 3. Statutory Regulation of Domicil.

must determine the question whether a domicil has been acquired or not, solely by reference to the principles of English law, including the principles of private international law as applied in England, and that the recognition or non-recognition of domicil by the law of a foreign State is immaterial on this question. If this question is determined in the affirmative, then, but not before, it becomes important to determine how the law of the foreign domicil would deal with the case, and this question must be answered by evidence of the foreign law (*b*).

The same reasoning applies where the court has to deal with a domicil of choice alleged to have been acquired in a country the legislature of which has regulated the acquisition of a domicil within its territory. In determining whether a domicil has in fact been acquired, any such regulations or restrictions are disregarded by the English court (*c*).

SUB-SECT. 2.—*The Domicile Act*, 1861.

Conventions.

297. The Crown is empowered, after a convention made for the purpose with any foreign State, to direct by Order in Council that for all purposes of testate or intestate succession to movables, a British subject resident at his death in such foreign country shall be deemed to retain the domicil he possessed at the time of going to reside there, unless he has been resident there for a year preceding his death and has made and deposited in a public office a declaration in writing of his intention to become domiciled there; and it may in like manner direct that no subject of the foreign country resident at his death in Great Britain or Ireland shall be deemed to have acquired a domicil there, unless he has been resident there for a year preceding his death and has signed and deposited with the Home Secretary a declaration in writing of his desire to become domiciled there, and that the law of the British domicil should regulate his movable succession. The Crown may also, after concluding a convention with a foreign State by which the like authority is secured to British consular officers in that State, direct by Order in Council that when any subject of that State dies within the dominions of the Crown, and no person is present at the time of the death who is entitled to administer the deceased's estate, the consular officer of that State may take possession of the personal property of the deceased, pay his debts and funeral expenses, and retain the surplus for the benefit of the persons entitled thereto; but such consular officer must immediately apply to the proper court for letters of

(*b*) *Re Martin, Loustalan* v. *Loustalan*, [1900] P. 211, C. A. "Until the question of the domicil of the testatrix is determined, the court cannot tell what law of what country has to be applied" (*per* LINDLEY, M.R., at p. 227).

(*c*) *Collier* v. *Rivaz* (1841), 2 Curt. 855; *Bremer* v. *Freeman* (1857), 10 Moo. P. C. C. 306; *Hamilton* v. *Dallas* (1875), 1 Ch. D. 257; *Anderson* v. *Laneuville* (1854), 9 Moo. P. C. C. 325; *Wauchope* v. *Wauchope* (1887), 4 R. (Ct. of Sess.) 945, 949. None of these cases appear to have been cited in *Re Johnson, Roberts* v. *A.-G.*, [1903] 1 Ch. 821. But compare *Re Bowes, Bates* v. *Wengel* (1906), 22 T. L. R. 711; as, however, in that case the learned judge held that the testator was in fact domiciled in France, it is submitted that the case, although professing to follow *Re Johnson, Roberts* v. *A.-G.*, *supra*, is not inconsistent with the cases cited in this note, and is really an authority for the statements in the text.

administration, which will be granted with such limitations as to the court seem fit (*d*).

SECT. 3. Statutory Regulation of Domicil.

SECT. 4.—*Commercial Domicil.*

Meaning of commercial domicil.

298. The subject of commercial or trade domicil belongs to the sphere of public international law, and is governed by special considerations (*e*). In this sense domicil has no reference to civil status, but affords the test by which in time of war a person's character as an enemy or a neutral is determined in the courts of a belligerent State (*f*). A commercial domicil is acquired whenever a person resides and carries on business in a country in time of war without any intention of bringing his business to an immediate end. A definite intention of bringing the business to an end at some fixed time in the future does not prevent the acquisition of a domicil, nor is any particular length of residence required (*g*). An occasional visit for a business purpose which is clearly of a temporary character does not, however, create a domicil (*h*), nor does the employment of a permanent business agent residing in the country (*i*); it is necessary that a man should so far act as a merchant of the country that the country may be said to derive advantage from the trade which he carries on there (*k*). On the other hand, a temporary visit may be so prolonged, contrary to the original intention of the party, as to lead irresistibly to the conclusion that a man has become a merchant of the country, and consequently to impose a domicil on him (*l*). If a person acts as a merchant, he acquires a commercial domicil, although he may also be the consular representative of another State (*m*). A fixed house of business is not necessary, but it is strong evidence to show that a person is so acting (*n*).

A person may possess more than one commercial domicil.

299. As the same person clearly may divide his time between several countries and be engaged in business in each of them, it follows that he may possess more than one commercial domicil at the same time; but the hostile or neutral character which each such domicil imposes only attaches to him as regards transactions

(*d*) Domicile Act, 1861 (24 & 25 Vict. c. 121), ss. 1, 2, 4. By s. 3 the Act does not apply to foreigners naturalised in the British dominions. No convention has hitherto been made under the Act.

(*e*) See title PRIZE LAW AND JURISDICTION; and compare *Hodgson* v. *De Beauchesne* (1858), 12 Moo. P. C. C. 285, at p. 313.

(*f*) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, *per* Lord LINDLEY, at p. 505; *Tabbs* v. *Bendelack* (1801), 4 Esp. 108.

(*g*) *The Diana* (1803), 5 Ch. Rob. 59; *The Indian Chief* (1801), 3 Ch. Rob. 12, 27.

(*h*) *The Jonge Klassina* (1804), 5 Ch. Rob. 297, 302.

(*i*) *The Anna Catharina* (1802), 4 Ch. Rob. 107, 119.

(*k*) *Tabbs* v. *Bendelack* (1801), 4 Esp. 108; and compare the language of Lord ALVANLEY, C.J., in *M'Connell* v. *Hector* (1802), 3 Bos. & P. 113; there must be conduct amounting to "commercial adherence" to a State.

(*l*) *The Harmony* (1800), 2 Ch. Rob. 322. "Be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil" (*per* Sir WILLIAM SCOTT, at p. 325).

(*m*) *The Indian Chief* (1801), 3 Ch. Rob. 12, 27.

(*n*) *The Jonge Klassina*, *supra*, at p. 303.

SECT. 4. Commercial Domicil.

which originate in the belligerent or the neutral country respectively, and does not cover those which originate elsewhere (*a*).

Loss of commercial domicil.

300. The distinction between domicil of origin and domicil of choice has little importance in cases of commercial domicil; but as a matter of evidence a domicil is more easily established in the country of origin than in a strange country, and more easily lost in a strange country than in the country of origin (*b*).

A commercial domicil is lost at the moment when a person puts himself in motion to quit the country of domicil *sine animo revertendi*, and actual or complete abandonment is not necessary (*c*); on the other hand, a mere intention to abandon, unaccompanied by some overt act, is not enough (*d*).

It is apprehended that the rules as to the domicil of dependent persons have no application to commercial domicil, but that the commercial domicil of such persons is in each case a question of fact alone (*e*).

Part III.—Nature of Property.

SECT. 1.—*In General.*

How determined.

301. Whether property is movable or immovable is determined by the law of the place where such property is situated.

Freehold interests, interests analogous to freehold, and chattel interests in land must always in the nature of things be immovables (*f*). Thus, English leaseholds rank with real estate as immovables and not with personalty as movables (*g*). But where the property is not thus of necessity to be classed as immovable, the *lex loci rei sitæ* must decide as to its nature (*h*).

(*a*) *The Jonge Klassina* (1804), 5 Ch. Rob. 297, 302; *The Portland* (1800), 3 Ch. Rob. 41, 44.

(*b*) *La Virginie* (1804), 5 Ch. Rob. 98; *The Ernst Merck* (1854), 2 Ecc. & Ad. 87.

(*c*) *The Baltica* (1855), Spinks, 264, 267; *The Ocean* (1804), 5 Ch. Rob. 90. It is possible that the statement in the text is only true where the domicil in process of abandonment is one of choice.

(*d*) *The President* (1804), 5 Ch. Rob. 277.

(*e*) Compare Dicey, Conflict of Laws, 2nd ed., Appendix, note 2; and, on the whole subject of commercial domicil, compare Wheaton, Elements of International Law, 4th English ed., Part IV., c. 1.

(*f*) Dicey, Conflict of Laws, 2nd ed., p. 74; Westlake, Private International Law, 4th ed., p. 203; *Allen* v. *Anderson* (1846), 5 Hare, 163; *Hood* v. *Barrington* (*Lord*) (1868), L. R. 6 Eq. 218; *Chatfield* v. *Berchtoldt* (1871), L. R. 12 Eq. 464; (1872) 7 Ch. App. 192; and see generally the cases quoted under this section. Such interests may of course be treated as personalty by the local law for certain purposes, *e.g.*, estates *pur autre vie* in England, under the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 20, for the purpose of duty; see note (*b*), p. 197, *post*.

(*g*) *Coppin* v. *Coppin* (1725), 2 P. Wms. 290; *Hood* v. *Barrington* (*Lord*), *supra*; *Freke* v. *Carbery* (*Lord*) (1873), L. R. 16 Eq. 461; *Duncan* v. *Lawson* (1889), 41 Ch. D. 394; compare *In the Goods of Gentili* (1875), I. R. 9 Eq. 541; *De Fogassieras* v. *Duport* (1881), 11 L. R. Ir. 123. Leaseholds are personal property within s. 1 of the Wills Act, 1861 (24 & 25 Vict. c. 114); see *Re Grassi*, *Stubberfield* v. *Grassi*, [1905] 1 Ch. 584. Compare *Pepin* v. *Bruyère*, [1900] 2 Ch. 504; [1902] 1 Ch. 24, C. A.; and see p. 219, *post*.

(*h*) *Chatfield* v. *Berchtoldt*, *supra*.

SECT. 1. In General.

A rent-charge issuing out of lands in England is an immovable (*i*), and so is an annuity payable out of the rents and profits of land, if held so to be by the law of the place where the land is situated (*k*). But in the case of rights, obligations, or documents connected with property, the *lex situs* of such property determines whether they are to be classed as movables or immovables (*l*). Thus, a Scots heritable bond is regarded as an immovable by the English court, since it is classed as such by Scots law (*m*), and the addition of a personal security in the bond makes no difference in this respect (*n*). The same principles apply to all cases of money secured on land. Thus, money secured by a mortgage of English land, being personal property by English law, is held to be such by the Scottish courts (*o*).

Where fixtures ambiguous in their nature are at all connected with immovable property it belongs to the *lex loci rei sitæ* of the immovable to determine whether they shall be considered movable or immovable (*a*).

Where peculiar attributes are ascribed to property by the local law for specific purposes or for purely local reasons, such attributes will not be recognised by the courts as affecting the nature of the property for any purpose other than that for which they were so attributed (*b*).

Where such peculiarities are by the law of England ascribed to property in England, the English courts will not extend them to foreign property or the proceeds thereof (*c*).

(*i*) *Chatfield* v. *Berchtoldt* (1871), L. R. 12 Eq. 464; (1872) 7 Ch. App. 192; and compare *Whitaker* v. *Forbes* (1875), L. R. 10 C. P. 583; 1 C. P. D. 51, C. A. (rent-charge issuing out of land in Australia held to be an immovable).

(*k*) See *Pitt* v. *Dacre* (*Lord*) (1876), 3 Ch. D. 295.

(*l*) Dicey, Conflict of Laws, 2nd ed., p. 497.

(*m*) *Drummond* v. *Drummond* (1799), 6 Bro. Parl. Cas. 601; *Johnstone* v. *Baker* (1808), 4 Madd. 474 (n.); *Buccleuch* (*Duchess*) v. *Hoare* (1819), 4 Madd. 467; *Elliott* v. *Minto* (*Lord*) (1821), 6 Madd. 16; *Trotter* v. *Trotter* (1828), 4 Bli. (N. S.), 502, H. L.; *Jerningham* v. *Herbert* (1828), 4 Russ. 388; *Jones* v. *Geddes* (1845), 1 Ph. 724; *Allen* v. *Anderson* (1846), 5 Hare, 163; *Cust* v. *Goring* (1854), 18 Beav. 383. Compare *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A.

(*n*) *Jerningham* v. *Herbert*, *supra*.

(*o*) *Monteith* v. *Monteith's Trustees* (1882), 9 R. (Ct. of Sess.) 982.

(*a*) *Freke* v. *Carbery* (*Lord*) (1873), L. R. 16 Eq. 461, at p. 467, *per* Lord SELBORNE, L.C.; *Ex parte Rucker* (1834), 3 Deac. & Ch. 704, where slaves in Antigua, who by the local law were considered as attached to the land, were held to pass under a mortgage of the land. Compare *Lushington* v. *Sewell* (1827), 1 Sim. 435; *Stewart* v. *Garnett* (1830), 3 Sim. 398; *Forbes* v. *Adams* (1839), 9 Sim. 462; and see *Re James Rea, Rea* v. *Rea*, [1902] 1 I. R. 451, 461, and *In re Moses, Moses* v. *Valentine*, [1908] 2 Ch. 235.

(*b*) *Chatfield* v. *Berchtoldt*, *supra*, where it was held that although the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 20, makes estates *pur autre vie*, when applicable by law in the same manner as personal estate, liable to duty as personal estate, they are only personal estate for this particular purpose, and are not therefore exempted from duty because the deceased owner happened to be domiciled abroad.

(*c*) *Beaumont* v. *Oliveira* (1868), L. R. 6 Eq. 534, proceeds of land in Madeira held to be pure personalty for the purposes of the Mortmain Act (9 Geo. 2, c. 36); compare *Oliphant* v. *Hendrie* (1784), 1 Bro. C. C. 571; *Mackintosh* v. *Townsend* (1809), 16 Ves. 330; *A.-G.* v. *Stewart* (1817), 2 Mer. 143; *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124. Foreign land was never included in the former rule of English law which favoured heirs and devisees against creditors (*Noell* v. *Robinson* (1682), 2 Vent. 358; *Beaumont* v. *Oliveira*, *supra*).

SECT. 2. Money representing Foreign Immovables.

SECT. 2.—*Money representing Foreign Immovables.*

Proceeds of sale of immovables.

302. Where a foreign immovable is sold, the rights of persons interested in the proceeds of sale do not cease to be governed by the law of the place where such immovable was situated merely because the proceeds of sale have been brought within the jurisdiction in specie (*d*). Thus, where the *lex loci rei sitæ* charges lands of a deceased person with payment of his debts, the proceeds of the sale of those lands remain charged therewith, and the debts are to be paid out of them according to the priorities recognised by that law (*e*). And where a claim to the land would have been barred by the local Statute of Limitations, a claim to the proceeds of sale of such land which have been paid into court in England will be similarly barred (*f*).

If lands of a deceased person have been sold by his personal representative and the proceeds remitted to this country, the rights which the widow of the deceased had in respect of the lands will attach to the money (*g*).

Exceptions to general rule.

303. The general rule that the proceeds of the sale of immovables are treated in all respects as the immovables themselves would have been is subject to certain exceptions. Thus, the proceeds of the sale of foreign immovables forming part of the assets of a partnership are personal property (*h*), and where land is sold under an agreement to sell, or under a trust for sale in a deed or will, the proceeds are personal estate (*i*).

But trusts declared of the proceeds of sale of a foreign immovable so directed to be sold are enforceable as regards those proceeds, although forbidden by the *lex loci rei sitæ* (*k*), unless the owner is for some other reason bound by the provisions of that law (*l*). But until sale actually takes place the immovable itself remains subject to the local law, and the right to enjoy it is governed thereby (*m*). Thus, where foreign land is settled on trust for sale, until sale takes

(*d*) *Hanson* v. *Walker* (1829), 7 L. J. (O. S.) (CH.) 135; *Re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Re James Rea, Rea* v. *Rea*, [1902] 1 I. R. 451; compare *Scott* v. *Allnutt* (1831), 2 Dow & Cl. 404, H. L.; *Waterhouse* v. *Stansfield* (1851), 9 Hare, 234; (1852) 10 Hare, 254. A *curator ad bona* of a foreign lunatic has no more title as such to the proceeds of sale of English lands than he had or would have had to the lands themselves (*Grimwood* v. *Bartels* (1877), 46 L. J. (CH.) 788).

(*e*) *Hanson* v. *Walker*, *supra*.

(*f*) *Re Peat's Trusts*, *supra*.

(*g*) *Re James Rea, Rea* v. *Rea*, *supra*.

(*h*) *Forbes* v. *Steven* (1870), L. R. 10 Eq. 178; and as such liable to legacy duty (*ibid.*).

(*i*) *Re Stokes, Stokes* v. *Ducroz* (1890), 62 L. T. 176; and as such liable to legacy duty (*ibid.*). Where property is converted from realty to personalty by the local law or by a law extending to the place where the property is situated, conversion takes place in every respect in accordance with the provisions of such law; see *Richards* v. *A.-G. of Jamaica* (1848), 6 Moo. P. C. C. 381, where it was held that a will valid to pass movables, but not immovables, passed money paid as compensation for slaves liberated by the Act for the Abolition of Slavery, 1833 (3 & 4 Will. 4, c. 73), which provided that such compensation should be treated as personalty.

(*k*) *Re Piercy, Whitwham* v. *Piercy*, [1895] 1 Ch. 83.

(*l*) *Ibid.*

(*m*) *Ibid.*; compare *Murray* v. *Champernowne*, [1901] 2 I. R. 232.

SECT. 2. Money representing Foreign Immovables.

place the form of alienation and capacity to alienate are governed by the *lex loci rei sitæ* (*n*).

Lastly, where there are no claims which would have been enforceable against the land by the local law, the proceeds of sale of foreign immovables belonging to a deceased person, when remitted to this country, are personalty in the hands of his personal representatives (*o*).

Part IV.—Immovables.

SECT. 1.—*General Principles of Jurisdiction.*

Jurisdiction with respect to foreign immovables.

304. The English courts have in general no jurisdiction to determine directly the title to a foreign immovable (*a*), nor can they entertain any action which substantially involves the determination of such title (*b*). Thus, no action will lie in this country to obtain possession (*c*), or to recover damages for dispossession (*d*), of foreign land, since the question of title must be dealt with in order to discover the rights of the parties.

For the same reason, the courts have no jurisdiction to determine the validity of a will of foreign immovables (*e*); and no action can be entertained in this country to recover arrears of a rent-charge issuing out of foreign lands (*f*), nor will an action lie for partition of such lands (*g*).

(*n*) *Murray* v. *Champernowne*, [1901] 2 I. R. 232.

(*o*) *Re James Rea, Rea* v. *Rea*, [1902] 1 I. R. 451. Such property ranks with other personalty, *e.g.*, for the purposes of the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29) (*ibid.*); compare *Noell* v. *Robinson* (1682), 2 Ventr. 358; *Beaumont* v. *Oliveira* (1868), L. R. 6 Eq. 534; (1869) 4 Ch. App. 309, cited note (*c*), p. 197, *ante*.

(*a*) *Companhia de Moçambique* v. *British South Africa Co.*, [1893] A. C. 602; *Roberdeau* v. *Rous* (1738), 1 Atk. 543; *Whitaker* v. *Forbes* (1875), L. R. 10 C. P. 583; 1 C. P. D. 51, C. A.; *The M. Moxham* (1876), 1 P. D. 107, C. A.; *Deschamps* v. *Miller*, [1908] 1 Ch. 856. In *Fryer* v. *Bernard* (1724), 2 P. Wms. 261, sequestration was granted against lands in Ireland on the ground that the King's Bench in England had a right to superintend the Irish courts. This ground is, of course, now untenable; see *Portarlington* (*Lord*) v. *Soulby* (1834), 3 My. & K. 104, 109.

(*b*) *Companhia de Moçambique* v. *British South Africa Co.*, *supra*. The same rule applies to the jurisdiction of equity with regard to foreign immovables (*ibid.*, at pp. 364, 366, *per curiam*); see p. 202, *post*. The principle applies equally to the jurisdiction of foreign courts with regard to English immovables; see Dicey, Conflict of Laws, 2nd ed., p. 357. As to petitions of right with regard to foreign immovables, see title CROWN PRACTICE.

(*c*) *Doulson* v. *Matthews* (1792), 4 Term Rep. 503; *Roberdeau* v. *Rous*, *supra*.

(*d*) *Skinner* v. *East India Co.* (1666), 6 State Tr. 710 (opinion of the judges); *Shelling* v. *Farmer* (1727), 1 Stra. 646.

(*e*) *Pike* v. *Hoare* (1763), Amb. 428; compare *Boyse* v. *Colclough* (1854), 1 K. & J. 124.

(*f*) *Whitaker* v. *Forbes*, *supra*.

(*g*) *Cartwright* v. *Pettus* (1675), 2 Cas. in Ch. 214. In *Tulloch* v. *Hartley* (1841), 1 Y. & C. Ch. Cas. 114, KNIGHT BRUCE, V.-C., entertained an action to settle boundaries of real estate in Jamaica, but the grounds of his judgment do not appear.

SECT. 1. General Principles of Jurisdiction.

It is probable that the courts have no jurisdiction to enforce a covenant for quiet enjoyment of foreign lands (*h*). An injunction cannot be granted to restrain a defendant from paying to some third party the proceeds of sale of a foreign immovable (*i*), nor can an account of such proceeds be ordered where the title to the immovable itself was in dispute (*k*).

The English courts cannot order discovery of documents relating to a foreign immovable, although the defendant has them in England (*l*).

Trespass.

305. In an action for damages for trespass to foreign lands where an issue of title is directly raised, either by the statement of claim or by the defence, the English courts are as incompetent to try the issue as they are to try an action directly brought for the recovery of the land (*m*). But where a local court of competent jurisdiction has pronounced upon the question of title, and the only question to be tried is the fact of trespass by the defendant and the amount of damages, the court, perhaps, has jurisdiction (*n*), and where the parties have submitted by agreement or otherwise to the jurisdiction, the court can entertain an action for damages for trespass (*o*).

As the necessity of determining questions of title prevents the

(*h*) See *Black Point Syndicate* v. *Eastern Concessions, Ltd.* (1898), 79 L. T. 658. It was admitted in this case to be a doubtful point whether the court could grant an injunction to restrain breaches of such a covenant. On principle it should not be able to do so. The whole question of jurisdiction is exhaustively discussed in *Companhia de Moçambique* v. *British South Africa Co.*, [1893] A. C. 602.

(*i*) *Matthaei* v. *Galitzin* (1874), L. R. 18 Eq. 340. MALINS, V.-C., in this case appears to base his decision chiefly on the fact that the parties were foreigners, but it should be noted that the defendant was in England and duly served with process. The decision will stand on other grounds; see Dicey, Conflict of Laws, 2d ed., p. 203. Similar cases decided on similar grounds by the same judge are *Blake* v. *Blake* (1870), 18 W. R. 944, and *Doss* v. *Secretary of State for India* (1875), L. R. 19 Eq. 509. The language of the Vice-Chancellor in these three cases is wide enough to cover most of the cases in which the equitable jurisdiction of the court is exercised. But the principles as there stated are not supported by *Re Holmes* (1861), 2 John. & H. 527, quoted as an authority for them in *Doss* v. *Secretary of State for India*, *supra*.

(*k*) *Re Hawthorne*, *Graham* v. *Massey* (1883), 23 Ch. D. 743.

(*l*) *Reiner* v. *Salisbury* (*Marquis*) (1876), 2 Ch. D. 378. "If then this bill is for discovery in aid of a suit which cannot be entertained in this court, that is, if the plaintiff does not show a title to sue, he shows no title to discovery" (*per* MALINS, V.-C., at p. 385).

(*m*) *Skinner* v. *East India Co.* (1666), 6 State Tr. 710, 719 (opinion of the judges); *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161, 180; *Doulson* v. *Matthews* (1792), 4 Term Rep. 503; *Companhia de Moçambique* v. *British South Africa Co.*, [1893] A. C. 602. Even where such issue is not raised, and the action is simply for damages, it would seem that the court has no jurisdiction; see *ibid.* [1892] 2 Q. B. 358, at p. 405, judgment of ESHER, M.R.; but compare [1892] 2 Q. B. 358, at p. 366, judgment of the Divisional Court; *The M. Moxham* (1876), 1 P. D. 107, 112, C. A. The Judicature Acts, by abolishing the rules as to venue, have not conferred on the courts any jurisdiction which they did not possess before (*Whitaker* v. *Forbes* (1875), L. R. 10 C. P. 583; 1 C. P. D. 51, C. A.; *Companhia de Moçambique* v. *British South Africa Co.*, *supra*). See title ACTION, Vol. I., p. 1.

(*n*) *Companhia de Moçambique* v. *British South Africa Co.*, [1892] 2 Q. B. 358, at pp. 368, 369, *per curiam*.

(*o*) *The M. Moxham* (1876), 1 P. D. 107, C. A.; and see p. 182, *ante*.

courts from entertaining an action for damages for trespass, they are equally unable to grant an injunction restraining such trespass (*p*).

Immovables in uncivilised country.

306. The English courts have no jurisdiction to try any issue in respect of immovables situated in a barbarous or unsettled country, where there are no local courts able to deal efficiently with the matter, which they would have been unable to try if the immovables had been situated in a civilised country (*q*).

Colonial land.

The fact that the Sovereign is presumed to be present in every part of his dominions does not give the English courts jurisdiction to entertain a petition of right in respect of colonial land (*r*).

Where English courts have jurisdiction.

307. Where, however, it is only necessary to determine the question of title incidentally, an action relating to rights in respect of a foreign immovable will lie in England (*s*). Thus, where a fund is in court representing the proceeds of sale of foreign immovables, and it is necessary to decide who is entitled to it, an action will lie (*t*); and where there is a contract relating only indirectly to foreign immovables, such as a covenant to pay rent or an agreement to contribute part of the cost of works to be undertaken on the land, the court has jurisdiction (*a*), and where, according to the local law, there is an obligation *ex contractu* or *quasi ex contractu* not to commit waste, the court will entertain an action to recover damages in respect of such waste if committed (*b*).

(*p*) See *Companhia de Moçambique* v. *British South Africa Co.*, [1892] 2 Q. B. 358, C. A.; [1893] A. C. 602, particularly the judgment of ESHER, M.R., referred to in note (*m*), p. 200, *ante*. There is no direct authority on the point, but in view of the principle upon which it is held that damages are not recoverable in respect of the trespass, it is impossible that the law could be otherwise.

(*q*) It was at one time thought otherwise. See *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161, at pp. 180, 181, where Lord MANSFIELD refers to an action tried before himself (against one Captain Gambier, who had pulled down plaintiff's houses in Nova Scotia), in which he overruled an objection to the jurisdiction on the ground that "the reparation was personal and for damages, and that otherwise there would be a failure of justice, for it was upon the coast of Nova Scotia where there were no regular courts of judicature; but if there had been, Captain Gambier might never go there again, and therefore the reason of locality in such an action in England did not hold. . . . I recollect another cause that came before me; which was the case of Admiral Palliser. There the very gist of the action was local: it was for destroying fishing huts upon the Labrador coast. . . . There are no local courts among the Esquimaux Indians upon that part of the Labrador coast, and therefore whatever injury had been done there by any of the King's officers would have been altogether without redress if the objection of locality would have held" (*ibid.*, at pp. 180, 181; compare *Rafael* v. *Verelst* (1775), 2 Wm. Bl. 983, 1055; *Companhia de Moçambique* v. *British South Africa Co.*, [1892] 2 Q. B. 358, at p. 366). This reasoning cannot now stand in view of the judgments (especially that of Lord HERSCHELL in *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602, at pp. 625, 626).

(*r*) *Re Holmes* (1861), 2 John. & H. 527. See this case referred to in note (*i*) on p. 200, *ante*; and see, further, title CROWN PRACTICE.

(*s*) See *A.-G.* v. *Stewart* (1817), 2 Mer. 143, 156; *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602, at p. 626.

(*t*) *Re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Pitt* v. *Dacre* (*Lord*) (1876), 3 Ch. D. 295.

(*a*) *Buenos Ayres and Ensenada Port Rail. Co.* v. *Northern Rail. Co. of Buenos Ayres* (1877), 2 Q. B. D. 210.

(*b*) *Batthyany* v. *Walford* (1886), 33 Ch. D. 624.

SECT. 1. General Principles of Jurisdiction.

The English courts have jurisdiction to order an account of rents and profits between tenants in common of a foreign immovable (*c*).

Jurisdiction also exists where questions relating both to movable and to immovable property are so closely bound up with one another that it is impossible or highly inconvenient to separate them (*d*).

Injunctions.

Where this is the case, and the court has entertained jurisdiction (*e*), an injunction will be granted, both as regards the immovables and the movables, against a party subsequently commencing proceedings in the local courts (*f*), although if the properties could be separated proceedings as to the immovables ought not to be restrained (*g*).

SECT. 2.—*Equitable Jurisdiction in Personam.*

SUB-SECT. 1.—*General Principles.*

Jurisdiction *in personam.*

308. The English courts have power to exercise a jurisdiction *in personam*, in respect of foreign immovables against persons locally within their jurisdiction (*h*), in cases where there is an equity between the parties arising from contract, fraud, or trust (*i*), provided that the decision of title be not directly involved (*k*). But such an equity must be of a personal nature, *i.e.*, there must be either a fiduciary relationship or privity of some other kind between the parties (*l*). For the courts will not exercise their jurisdiction in order to enforce English principles of equity against third persons who have acquired a good title by the local law (*m*), or (in the absence of privity between the parties) to impose on a foreign immovable a burden greater than the local law requires it to bear (*n*).

(*c*) *Roberdeau* v. *Rous* (1738), 1 Atk. 543; compare *Bayley* v. *Edwards* (1792), 3 Swan. 703, P. C.

(*d*) *Bunbury* v. *Bunbury* (1839), 1 Beav. 318; *Hope* v. *Carnegie* (1886), 1 Ch. App. 320; *Re Clinton, Clinton* v. *Clinton* (1903), 88 L. T. 17; Westlake, Private International Law, 4th ed., p. 213.

(*e*) *E.g.*, where the properties are subject to a trust and a decree for administration thereof has been pronounced; see *Hope* v. *Carnegie, supra.*

(*f*) *Hope* v. *Carnegie, supra.*

(*g*) *Ibid.* But see the dissenting judgment of KNIGHT BRUCE, L.J., who held that the injunction should be granted in any case. As to restraining proceedings in foreign courts, see p. 204, note (*h*), *post.*

(*h*) For cases where leave may be obtained to serve the writ out of the jurisdiction, see *Jenney* v. *Mackintosh* (1886), 33 Ch. D. 595; *Bawtree* v. *Great North-West Central Rail. Co.* (1898), 14 T. L. R. 448, C. A; *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; and title PRACTICE AND PROCEDURE.

(*i*) *Penn* v. *Baltimore* (*Lord*) (1750), 1 Ves. Sen. 444; *Cranstown* (*Lord*) v. *Johnston* (1796), 3 Ves. 170; *Harrison* v. *Gurney* (1821), 2 Jac. & W. 563; compare *Companhia de Moçambique* v. *British South Africa Co.*, [1893] A. C. 602, and *Deschamps* v. *Miller*, [1908] 1 Ch. 856. Probably jurisdiction will not be entertained where the parties have bound themselves to submit only to the local jurisdiction; see *Buenos Ayres and Ensenada Port Rail. Co.* v. *Northern Rail. Co. of Buenos Ayres* (1877), 2 Q. B. D. 210. As to what principles of English equity are enforced, see cases cited in note (*m*) on p. 204, and notes (*d*) and (*e*) on p. 206, *post.*

(*k*) *Companhia de Moçambique* v. *British South Africa Co.*, [1892] 2 Q. B. 358, C. A., at pp. 364, 366, *per curiam; Re Hawthorne, Graham* v. *Massey* (1883), 23 Ch. D. 743; *Re Clinton, Clinton* v. *Clinton* (1903), 88 L. T. 17.

(*l*) *Brodie* v. *Barry* (1813), 2 Ves. & B. 127; *Harrison* v. *Harrison* (1873), 8 Ch. App. 342.

(*m*) *Martin* v. *Martin* (1831), 2 Russ. & M. 507; *Hicks* v. *Powell* (1869), 4 Ch. App. 741; compare *Waterhouse* v. *Stansfield* (1851), 9 Hare, 234; (1852) 10 Hare, 254; *Norris* v. *Chambres* (1861), 29 Beav. 246.

(*n*) *Harrison* v. *Harrison, supra; Re Hewit, Lawson* v. *Duncan*, [1891] 3 Ch. 568.

SECT. 2. Equitable Jurisdiction in Personam.

Thus, the claim of legatees to marshal against the heir of a foreign immovable will not be entertained (*o*), nor will the courts, in an action by an unpaid vendor of foreign immovables, use their equitable jurisdiction to enforce a lien against such immovables in the hands of a purchaser subsequently acquiring a good title by the *lex loci rei sitæ* (*p*).

Similarly, where a marriage settlement of foreign land does not, according to the local law, bind the land, but creates only a personal equity against the husband, the wife cannot enforce a claim against the land in the hands of a mortgagee (*q*); nor has the purchaser under a contract for the sale of land any power to claim relief against a person who subsequently gained a good title by the local law, even where such person took with notice of the contract (*r*).

Against third parties.

309. But the courts will exercise their equitable jurisdiction against third parties who are affected by equities under the *lex loci rei sitæ* itself. Thus, where a conveyance is effectual to pass the beneficial interest in a foreign immovable, the courts have jurisdiction to compel a conveyance by the owner of the legal estate (*s*); and where a third party takes a foreign immovable under an express obligation to satisfy another's equitable claim out of it, the courts will exercise jurisdiction and enforce the claim (*t*).

Where jurisdiction is exercisable against any person, it is also exercisable against his assignee in bankruptcy (*a*).

Limitations on the jurisdiction.

310. But the general principle that the English courts have jurisdiction in cases where there is an equity between the parties is subject to certain limitations. Thus, the courts will not prevent a person by injunction from enjoying what a judgment of the local court has declared him to be entitled to (*b*), and where the local

(*o*) *Harrison* v. *Harrison* (1873), 8 Ch. App. 342 (claim of legatees to marshal against the heir of Scots real estate). "Any jurisdiction which they (the English courts) can exercise as to the real estate in Scotland can only be through the medium of some personal equity attaching to the owner in Scotland of that real estate, who, in this case, is the Scots heir. What is that personal equity? There is no fiduciary relation. What right have these legatees upon the footing of personal equity to say that the heir shall not enjoy the Scots real estate as the law of Scotland gives it to him or that any burthen shall directly or indirectly be thrown upon that real estate in their favour which would not be imposed by the law of Scotland? It seems quite clear that this court cannot found any such equity upon the accident of the heir-at-law being before it as a party to the suit. The equity must be founded upon some higher principle" (*per* Lord SELBORNE, L.C., at p. 349).

(*p*) *Norris* v. *Chambres* (1861), 29 Beav. 246; compare *Deschamps* v. *Miller*, [1908] 1 Ch. 856.

(*q*) *Martin* v. *Martin* (1831), 2 Russ. & M. 507; compare *Deschamps* v. *Miller* *supra*.

(*r*) See *Norton* v. *Florence Land and Public Works Co.* (1877), 7 Ch. D. 332; and compare *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.*, [1892] 2 Ch. 303; *Deschamps* v. *Miller*, *supra*.

(*s*) *Jenney* v. *Macintosh* (1886), 33 Ch. D. 595; compare *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

(*t*) *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.*, *supra*.

(*a*) *Re Courtney, Ex parte Pollard* (1840), Mont. & Ch. 239; compare *Waterhouse* v. *Stansfield* (1851), 9 Hare, 234; (1852) 10 Hare, 254. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 1.

(*b*) *White* v. *Hall* (1806), 12 Ves. 321.

SECT. 2. **Equitable Jurisdiction in Personam.**

court having actual jurisdiction over the subject-matter has entertained jurisdiction by a prior litigation (*c*), interference between the same litigants would be contrary to the comity of nations and will not be permitted (*d*). Nor will the courts entertain an action where the *lex loci rei sitæ* would not allow the defendant to do what the courts might otherwise decree (*e*); nor will they interfere where to do so would be useless, and it would be impossible for the decree to be carried into effect (*f*). Thus, a sale of land outside the jurisdiction, with specific directions by the court, cannot be ordered (*g*).

Moreover, as equitable remedies are in the discretion of the court, jurisdiction will not be exercised (and *à fortiori* proceedings in foreign courts will not be restrained by injunction (*h*)) where, on the whole, the question can be more conveniently decided in the local courts than in England (*i*).

SUB-SECT. 2.—*Trusts relating to Foreign Immovables.*

Jurisdiction to enforce trusts.

311. The English courts have jurisdiction to enforce a trust relating to foreign immovables where the defendant is in this country (*k*), and therefore have jurisdiction to decide whether there is or is not in existence a valid trust of such immovables (*l*).

But where the courts employ this jurisdiction, the strict rules of English law with regard to trustees will not necessarily be enforced if the relationship between plaintiff and defendant arose under a foreign law, and is not exactly that of trustee and *cestui que trust* as understood by the English courts (*m*).

(*c*) It is not necessary that judgment be given, provided the action has been commenced; see *Norton* v. *Florence Land and Public Works Co.* (1877), 7 Ch. D. 332.

(*d*) *Norton* v. *Florence Land and Public Works Co., supra.*

(*e*) *Re Courtney, Ex parte Pollard* (1840), Mont. & Ch. 239, 250; but see *Norris* v. *Chambres* (1861), 29 Beav. 246.

(*f*) *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.*, [1892] 2 Ch. 303; compare *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602, 625, 626; *Re Courtney, Ex parte Pollard, supra.*

(*g*) *Grey* v. *Manitoba and North Western Rail. Co. of Canada*, [1897] A. C. 254. It makes no difference if part of the land in question is within the jurisdiction (*ibid.*).

(*h*) As to restraining actions in foreign courts with regard to foreign immovables, see *Beckford* v. *Kemble* (1822), 1 Sim. & St. 7; *Booth* v. *Leycester* (1837), 1 Keen, 579; *Harrison* v. *Gurney* (1821), 2 Jac. & W. 563; *Hope* v. *Carnegie* (1886), 1 Ch. App. 320; and, generally, Part X., p. 281, *post.*

(*i*) *Jones* v. *Geddes* (1845), 1 Ph. 724; compare *Hearn* v. *Glanvill* (1883), 48 L. T. 356.

(*k*) *Cartwright* v. *Pettus* (1675), 2 Cas. in Ch. 214; *Kildare* (*Earl*) v. *Eustace* (*Sir M.*) (1686), 1 Vern. 419; *Scott* v. *Nesbitt* (1808), 14 Ves. 438; *Clarke* v. *Ormonde* (*Earl*) (1821), Jac. 108; *Harrison* v. *Gurney, supra; Houlditch* v. *Donegall* (*Marquess*) (1834), 2 Cl. & Fin. 470, H. L.; *Beattie* v. *Johnstone* (1848), 8 Hare, 169; *Paget* v. *Ede* (1874), L. R. 18 Eq. 118; *Jenney* v. *Macintosh* (1886), 33 Ch. D. 595; *Re Clinton, Clinton* v. *Clinton* (1903), 88 L. T. 17; compare *Ewing* v. *Orr Ewing* (1883), 9 App. Cas. 34, 40; *Concha* v. *Concha*, [1892] A. C. 670; *Companhia de Moçambique* v. *British South Africa Co.*, [1893] A. C. 602. In *Foster* v. *Vassall* (1747), 3 Atk. 587, an account was ordered against executors on whom by the local law the land devolved.

(*l*) *Re Clinton, Clinton* v. *Clinton, supra.*

(*m*) See *Concha* v. *Concha, supra, per* Lord MACNAGHTEN, at p. 675. On principle, where there is a trust of immovables, the relationship and rights of

SUB-SECT. 3.—*Mortgages of Foreign Immovables.*

SECT. 2. Equitable Jurisdiction in Personam.

Mortgages.

312. Where a mortgage, whether legal or equitable, of foreign immovables has been validly made according to English law, an English court will compel the mortgagor to pay off the mortgage debt out of the proceeds of sale of the land (*n*), although the mortgage does not comply with the *lex situs* or a mortgage of the particular kind in question (*o*) is unknown to the local law (*p*).

But a mortgage will not be enforced against an assignee of the immovable, even where he takes with notice of the incumbrance (*q*), unless he is bound either by express obligation (*r*) or by the local law itself (*s*) to satisfy the claims of the incumbrancer.

The courts have jurisdiction to entertain an action for foreclosure (*t*) or a redemption suit (*a*) in respect of foreign immovables, and where a redemption decree has been made in this country an injunction will be granted against a mortgagee who brings a foreclosure action in the local courts, and *vice versâ* (*b*).

SUB-SECT 4.—*Contracts relating to Foreign Immovables.*

Specific performance.

313. The English courts have jurisdiction to enforce specifically any contract relating to foreign immovables which the *lex loci rei sitæ* allows to be carried into effect (*c*). But where the law of

the parties should be determined strictly in accordance with the *lex loci rei sitæ;* compare *Bent* v. *Young* (1838), 9 Sim. 180, 190. See title TRUSTS AND TRUSTEES.

(*n*) *Derby* (*Earl*) v. *Atholl* (*Duke*) (1749), 1 Ves. Sen. 201; *Re Courtney, Ex parte Pollard* (1840), Mont. & Ch. 239. Compare *Norton* v. *Florence Land and Public Works Co.* (1877), 7 Ch. D. 332; *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.*, [1892] 2 Ch. 303.

(*o*) *E.g.*, an equitable mortgage (*Re Courtney, Ex parte Pollard, supra*).

(*p*) *Re Courtney, Ex parte Pollard, supra;* compare *Re Scheibler, Ex parte Holthausen* (1874), 9 Ch. App. 722.

(*q*) *Norton* v. *Florence Land and Public Works Co., supra,* where holders of "obligations" expressed to bind the land, but insufficient in point of form to do so according to the local law, were postponed to a subsequent purchaser with notice.

(*r*) *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co., supra.*

(*s*) See *Jenney* v. *Macintosh* (1886), 33 Ch. D. 595.

(*t*) *Toller* v *Carteret* (1705), 2 Vern. 494; *Derby* (*Earl*) v. *Atholl* (*Duke*) (1749), 1 Ves. Sen. 201; *Paget* v. *Ede* (1874), L. R. 18 Eq. 118. Compare *Portarlington* (*Lord*) v. *Soulby* (1834), 3 My. & K. 104, 108; *Norris* v. *Chambres* (1861), 29 Beav. 246; *Re Hawthorne, Graham* v. *Massey* (1883), 23 Ch. D. 743, 747, 748; *Bawtree* v. *Great North-West Central Rail. Co.* (1898), 14 T. L. R. 448, C. A.

(*a*) *Beckford* v. *Kemble* (1822), 1 Sim. & St. 7; compare *Bent* v. *Young* (1838), 9 Sim. 180.

(*b*) *Beckford* v *Kemble, supra.* Compare *Portarlington* (*Lord*) v. *Soulby, supra; Moor* v. *Anglo-Italian Bank* (1879), 10 Ch. D. 681; *Hope* v. *Carnegie* (1886), 1 Ch. App. 320; and see p. 204, note (*h*), *ante.* In administering relief in the case of a mortgage on a foreign immovable (*semble*) the *lex loci rei sitæ* determines the rights of the parties (*Bent* v. *Young, supra*); compare *Norris* v. *Chambres, supra,* at p. 255. For appointment of receivers and taking accounts see p. 206, *post.*

(*c*) *Penn* v. *Baltimore* (*Lord*) (1750), 1 Ves. Sen. 444; *Cranstown* (*Lord*) v. *Johnstone* (1796), 3 Ves. 170; *Jackson* v. *Petrie* (1804), 10 Ves. 164; *Re Courtney, Ex parte Pollard, supra,* at pp. 250, 251, 252. Compare *White* v. *Hall* (1806), 12 Ves. 321; *Portarlington* (*Lord*) v. *Soulby, supra,* at p. 108; *Ewing* v. *Orr Ewing* (1883), 9 App. Cas. 34, 40; *Companhia de Moçambique* v. *British South Africa Co.*, [1893] A. C. 602; *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902]

SECT. 2. Equitable Jurisdiction in Personam.

the *situs* allows the performance of the contract and it is enforceable in England, the courts will act upon their own principles without considering what the effect of such contracts may be in the country where the immovable is situated or the manner in which the courts of the *situs* might deal with them (*d*). Thus, laches or acquiescence will disentitle a person to specific performance of, or to set aside, a contract, whatever the local law on the subject may be (*e*).

Whether or no a contract to assign an immovable creates any interest in the land depends upon the *lex loci rei sitæ* (*f*).

SUB-SECT. 5.—*Fraud and Inequitable Dealing.*

Relief against fraud.

314. The English courts have jurisdiction to grant relief in cases of fraud or inequitable dealing with regard to foreign immovables (*g*). Thus jurisdiction exists to set aside, or otherwise relieve against, a conveyance of foreign immovables procured by fraud (*h*).

A creditor who, under his own execution, purchases foreign land belonging to his debtor, will be compelled by the court to hold it as security for the debt, and therefore subject to a right of redemption (*i*). But the courts have no jurisdiction to set aside a judicial sale made under the process or judgment of a local court of competent jurisdiction, even where such judgment has enabled the defendant to buy in a manner which was, in fact, fraudulent (*k*).

SUB-SECT. 6.—*Jurisdiction to order Accounts and appoint a Receiver.*

Accounts.

315. The English courts have jurisdiction to order an account of the rents and profits of a foreign immovable against any person liable

2 Ch. 132. Where, by the *lex loci rei sitæ*, a creditor has a right to prevent his debtor, whether solvent or insolvent, from giving a preference to any creditor, a contract entered into in respect of immovables situated within the jurisdiction of the courts of the *situs* and purporting to give such a preference cannot be enforced by the court (*Waterhouse* v. *Stansfield* (1851), 9 Hare, 234; (1852) 10 Hare, 254; compare *Re Courtney, Ex parte Pollard* (1840), Mont. & Ch. 239). As to the general subject of contracts relating to foreign immovables, see note (*m*) on p. 237, and note (*b*) on p. 242, *post*.

(*d*) *Re Courtney, Ex parte Pollard, supra*.

(*e*) *Cood* v. *Cood* (1862), 9 Jur. (N. S.) 1335. In this case great stress was laid (unnecessarily, it is submitted) on the fact that all the parties were British subjects, and that two of them were domiciled in England.

(*f*) *Norris* v. *Chambres* (1861), 29 Beav. 246. See *Deschamps* v. *Miller*, [1908] 1 Ch. 856, where a covenant in a French marriage settlement to assign after-acquired property was held not to affect a purchaser acquiring a good title by Indian law to such property situated in India.

(*g*) *Arglasse* v. *Muschamp* (1682), 1 Vern. 75; *Angus* v. *Angus* (1737), West *temp.* Hard. 23; *Derby* (*Earl*) v. *Atholl* (*Duke*) (1749), 1 Ves. Sen. 201; *Cranstown* (*Lord*) v. *Johnstone* (1796), 3 Ves. 170. Compare *Jackson* v. *Petrie* (1804), 10 Ves. 164; *White* v. *Hall* (1806), 12 Ves. 321; *Jones* v. *Geddes* (1846), 1 Ph. 724; *Companhia de Moçambique* v. *British South Africa Co.*, [1893] A. C. 602.

(*h*) *Arglasse* v. *Muschamp, supra; Angus* v. *Angus, supra*. Compare *Kildare* (*Earl*) v. *Eustace* (*Sir M.*) (1686), 1 Vern. 419; *Clarke* v. *Ormonde* (*Earl*) (1821), Jac. 108; *Beckford* v. *Kemble* (1822), 1 Sim. & St. 7; *Bunbury* v. *Bunbury* (1839), 1 Beav. 318; *Tulloch* v. *Hartley* (1841), 1 Y. & C. Ch. Cas. 114. The same defences would no doubt be admissible as though the land were in England; see *Cood* v. *Cood* (1862), 9 Jur. (N. S.) 1335, and notes (*d*) and (*e*), *supra*.

(*i*) *Cranstown* (*Lord*) v. *Johnstone, supra;* compare *White* v. *Hall, supra*.

(*k*) *White* v. *Hall, supra*.

to account in respect thereof (*l*), and in a suitable case a receiver will be appointed (*m*). The court does not, and cannot, by its order put a receiver in possession of foreign immovables, but any party to the action in which the order is made who prevents the necessary steps from being taken to enable the receiver to take possession according to the *lex loci rei sitæ* is guilty of contempt (*n*). But the mere appointment of a receiver does not make guilty of contempt of court a person not a party to the action who takes proceedings in the local courts before such receiver is in possession according to the local law (*o*).

Receiver.

SECT. 3.—*Assignment of Immovables.*

SUB-SECT. 1.—*Capacity and Form.*

316. Capacity to assign or acquire an immovable is governed entirely by the *lex loci rei sitæ* (*p*).

The legal estate in an immovable can only be assigned in the form required by the *lex loci rei sitæ* (*q*), but the court will recognise as valid in point of form every assignment which is so valid by that law (*r*), although equities may in certain cases prevent the assignee from getting a good title (*s*).

Form of conveyance.

Thus, every assignment of land in England must be in the form required by English law (*t*), but a conveyance of foreign land need

(*l*) *Foster* v. *Vassall* (1747), 3 Atk. 587; *Scott* v. *Nesbitt* (1808), 14 Ves. 438; *Beattie* v. *Johnstone* (1848), 8 Hare, 169. Compare *Hendrick* v. *Wood* (1862), 9 Jur. (N. S.) 117; *Paget* v. *Ede* (1874), L. R. 18 Eq. 118. In *Cartwright* v. *Pettus* (1675), 2 Cas. in Ch. 214 (apparently the same case as *Carteret* v. *Petty* (1676), Swan. 323, n.), the defendant was out of England, and so the court had no jurisdiction.

(*m*) *Clarke* v. *Ormonde* (*Earl*) (1821), Jac. 108, 116, 121; *Harrison* v. *Gurney* (1821), 2 Jac. & W. 563; *Houlditch* v. *Donegall* (*Marquis*) (1834), 2 Cl. & Fin. 470, H. L.; *Paget* v. *Ede*, *supra*; *Re Maudslay, Sons and Field*, *Maudslay* v. *Maudslay, Sons and Field*, [1900] 1 Ch. 602, 611. Compare *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; and see *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.*, [1892] 2 Ch. 303, where the court refused to appoint a receiver on the ground that to do so would be useless.

(*n*) *Re Maudslay, Sons and Field*, *Maudslay* v. *Maudslay, Sons and Field*, *supra*.

(*o*) *Ibid.*

(*p*) Dicey, Conflict of Laws, 2nd ed., p. 501; Foote, Private International Jurisprudence, 3rd ed., p. 213. Compare *Doe* d. *Birtwhistle* v. *Vardill* (1826), 5 B. & C. 438; (1835) 2 Cl. & Fin. 571, H. L.; (1839) 7 Cl. & Fin. 895; (1840) 7 Cl. & Fin. 940; *Re Don's Estate* (1857), 4 Drew. 194; *Fenton* v. *Livingstone* (1859), 3 Macq. 497, H. L.; *Re Hernando*, *Hernando* v. *Sawtell*, (1884), 27 Ch. D. 284; *Duncan* v. *Lawson* (1889), 41 Ch. D. 394.

(*q*) *Re Courtney*, *Ex parte Pollard* (1840), Mont. & Ch. 239; *Hicks* v. *Powell* (1869), 4 Ch. App. 741; *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.*, [1892] 2 Ch. 303; *Deschamps* v. *Miller*, [1908] 1 Ch. 856. For assignment of immovables in consequence of marriage, see pp. 275, 277, *post*; and for succession to immovables, see p. 218, *post*.

(*r*) *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403. Compare *Re Hernando*, *Hernando* v. *Sawtell*, *supra*; *Re Grassi*, *Stubberfield* v. *Grassi*, [1905] 1 Ch. 584.

(*s*) *Re Courtney*, *Ex parte Pollard*, *supra*. Compare *Martin* v. *Martin* (1831), 2 Russ. & M. 507; *Norris* v. *Chambres* (1861), 29 Beav. 246; *Waterhouse* v. *Stansfield* (1851), 9 Hare, 234; (1852) 10 Hare, 254, and note (*f*) on p. 208, *post*.

(*t*) *Coppin* v. *Coppin* (1725), 2 P. Wms. 291. Compare *Re Hernando*, *Hernando* v. *Sawtell*, *supra*. A foreign curator or guardian has no title as such to the immovable property of his ward in this country (*Grimwood* v. *Bartels* (1877), 46 L. J. (CH.) 788). Under the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), s. 102 (3), a Scots sequestration vests in the trustee all real estate situated in

SECT. 3, Assignment of Immovables.

not be under seal, if a seal is not required by the *lex loci rei sitæ* (*a*).

Informal assignments.

317. An assignment invalid in point of form may, however, be binding in equity as between immediate parties (*b*) and their assignees in bankruptcy (*c*), and it makes no difference if the assignment is by the local law inoperative both in law and equity, provided there is between the parties an equity binding by English law (*d*). But as regards third parties such an assignment has no more effect in England than the local law allows to it (*e*), and accordingly third parties subsequently acquiring the legal estate by the local law are not affected by notice of equitable rights unless they are so affected according to the local law (*f*). But where an informal conveyance is nevertheless effectual by the local law to

England, Ireland or any of His Majesty's dominions, but as regards freeholds, copyholds and leaseholds the act and warrant of confirmation must be registered in the chief court of bankruptcy for the country in which the property is situated in the same way as an adjudication under the local law would have had to be registered. Under the Bankruptcy and Insolvency (Ireland) Act, 1857 (20 & 21 Vict. c. 60), s. 268, an Irish adjudication vests all real estate (except copyhold and customary-hold), wherever situated, in the trustee, but in cases where the immovable is situated in part of His Majesty's dominions and by the local law registration is required, this must be done (s. 269). Under both these Acts a *bonâ fide* purchaser for value is protected when the requisite registration has not been effected. Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20 (1), an English adjudication vests all property of the bankrupt in the trustee. In this Act "property" includes every description of property, whether real or personal, and whether situated in England or elsewhere (s. 168). But the adjudication can only pass the title to colonial immovables, subject to any requirements as to registration of the *lex loci rei sitæ* (*Re Boustead, Ex parte Rogers* (1881), 16 Ch. D. 665, C. A.; *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460)—both decisions on the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)), but the principle is the same. For the law under the older Acts, see *Selkrig* v. *Davis* (1814), 2 Rose, 97, 291, H. L.; and compare *Cockerell* v. *Dickens* (1840), 1 Mont. D. & De G. 45. The same rule applies *à fortiori* to land situated in a foreign country (Dicey, Conflict of Laws, 2nd ed., pp. 331, 332). But an English bankrupt may be compelled under s. 24 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), to execute a power of attorney in favour of the trustee for the purpose of procuring a conveyance to him of foreign immovables belonging to the bankrupt (*Re Harris* (1896), 74 L. T. 221). A foreign or colonial bankruptcy does not pass immovables in England (*Waite* v. *Bingley* (1882), 21 Ch. D. 674). See further on this subject, Westlake, Private International Law, 4th ed., pp. 165 *et seq.*, and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 153.

(*a*) *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403.

(*b*) See Part IV., sect. 2, *passim*, *ante*.

(*c*) *Re Courtney, Ex parte Pollard* (1840), Mont. & Ch. 239; compare *Waterhouse* v. *Stansfield* (1851), 9 Hare, 234; (1852) 10 Hare, 254.

(*d*) *Re Courtney, Ex parte Pollard, supra*.

(*e*) *Martin* v. *Martin* (1831), 2 Russ. & M. 507; *Re Courtney, Ex parte Pollard, supra; Waterhouse* v. *Stansfield, supra; Hicks* v. *Powell* (1869), 4 Ch. App. 741; *Norton* v. *Florence Land and Public Works Co.* (1877), 7 Ch. D. 332; and see p. 203, *ante*.

(*f*) *Hicks* v. *Powell, supra*. Third parties will of course be bound where they take the land subject to an express obligation to satisfy another's equitable claim (see *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.*, [1892] 2 Ch. 303). Where the local law merely provides that an instrument shall not be given in evidence unless certain conditions have been complied with (*e.g.*, registration), it will probably be a question whether such law leaves the assignment valid, but merely incapable of being proved. In such a case (*semble*) the English courts might disregard

pass the beneficial interest, anyone taking the legal estate with notice will be compelled to convey it to the person entitled (*g*).

SECT. 3. Assignment of Immovables.

SUB-SECT. 2.—*Material Validity of, and Restrictions on, Assignment.*

Legal invalidity of assignment.

318. Although the requirements of the local law may be satisfied as regards capacity and form, the assignment of an immovable may be materially invalid by reason of some provision of that law forbidding or regulating the assignment, and such provision will be recognised by the courts of this country. Thus, where the *lex loci rei sitæ* absolutely forbids an assignment, such assignment will not be recognised in this country, nor can equities be enforced against the *lex loci rei sitæ* in respect either of the land or of the proceeds thereof (*h*).

On the other hand, a limitation of immovables which is not allowed by English law will, nevertheless, be held valid if allowed by the *lex loci rei sitæ* (*i*), since no law can impose restrictions on dealings with land which are not imposed by the local law itself (*k*).

Restrictions on assignment.

319. But limitations of English land must not offend against the perpetuity rule (*l*), and where English land is settled upon trusts to accumulate which exceed the periods allowed by the Accumulations Acts, 1800 and 1892 (*m*), the direction will be void, for the excess or entirely, as the case may be (*n*).

Mortmain.

Every assignment of land in England, whether *inter vivos* or by will, must comply with the provisions of the Mortmain and Charitable Uses Acts, 1888 and 1891 (*o*), whatever the domicil of the assignor may be (*p*). In such a case it is immaterial whether

it on the ground that questions of evidence are to be determined by the *lex loci* (see *Hicks* v. *Powell* (1869), 4 Ch. App. 741, at p. 746).

(*g*) *Jenney* v. *Macintosh* (1886), 33 Ch. D. 595. An invalid assignment of a security may nevertheless be a good assignment of the debt, and in such a case a subsequent assignee of the security holds it for the assignee of the debt (*Cust* v. *Goring* (1854), 18 Beav. 383).

(*h*) *Waterhouse* v. *Stansfield* (1852), 10 Hare, 254, at p. 259, *per* TURNER, V.-C.

(*i*) *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A. (life interest to a man in a Scots heritable bond subject to a protection analogous to restraint on anticipation).

(*k*) *Oliphant* v. *Hendrie* (1784), 1 Bro. C. C. 571; *Mackintosh* v. *Townsend* (1809), 16 Ves. 330; *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124; *Re Hernando, Hernando* v. *Sawtell* (1884), 27 Ch. D. 284. Compare *A.-G.* v. *Stewart* (1817), 2 Mer. 143; *A.-G.* v. *Mill* (1827), 3 Russ. 328; (1831) 2 Dow & Cl. 393, H. L.; *Freke* v. *Carbery* (*Lord*) (1873), L. R. 16 Eq. 461; *Canterbury Corporation* v. *Wyburn*, [1895] A. C. 89.

(*l*) *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 584, at p. 592, *per* BUCKLEY, J. See title PERPETUITIES.

(*m*) 39 & 40 Geo. 3, c. 98; 55 & 56 Vict. c. 58.

(*n*) *Freke* v. *Carbery* (*Lord*), *supra*, where the lands were partly in England and partly in Ireland, and the trusts were held bad as to the former but good as to the latter, the Act not applying to Irish land. See also *Re Grassi, Stubberfield* v. *Grassi*, *supra*, *loc. cit.* and *Studd* v. *Cook* (1883), 8 App. Cas. 577. The domicil of a testator makes no difference in these cases.

(*o*) 51 & 52 Vict. c. 42; 54 & 55 Vict. c. 73.

(*p*) *Curtis* v. *Hutton* (1808), 14 Ves. 537, devise of real estate in England on trust for sale and transfer of proceeds to a charity held void under the Mortmain Act, 1736 (9 Geo. 2, c. 36); compare *A.-G.* v. *Mill* (1827), 3 Russ. 328. See also *Re Hewit, Lawson* v. *Duncan*, [1891] 3 Ch. 568, where a direction in a will to pay certain charitable legacies out of English land was held void; and compare *Duncan* v. *Lawson* (1889), 41 Ch. D. 394. See titles CHARITIES, Vol. IV., p. 141; REAL PROPERTY AND CHATTELS REAL.

SECT. 3. Assignment of Immovables.

the charity is English or foreign (*q*). Where money is bequeathed by a domiciled Englishman to a charity for the purpose of buying land in England, the gift is void unless it complies with the provisions of the Acts (*r*), but such a bequest will be good in any case, if the land directed to be purchased is foreign land (*s*). Where, however, the testator is not domiciled in England, a bequest of personalty to a charity to be laid out in land (whether in England or elsewhere) is probably always valid if allowed by the law of the testator's domicil (*t*).

In either case, if an option is given to the trustees to invest the money either in land or in other securities, the bequest will be good (*a*). Similarly the bequest will be good where the trustees have an option to buy land either in England or elsewhere (*b*). In

(*q*) *Curtis* v. *Hutton* (1808), 14 Ves. 537.

(*r*) On the principle that the material validity of a will of movables depends on the law of the testator's domicil (see *Curtis* v. *Hutton, supra; A.-G.* v. *Mill* (1827), 3 Russ. 328; (1831) 2 Dow & Cl. 393, H. L.; *Canterbury Corporation* v. *Wyburn*, [1895] A. C. 89). It is difficult to see why the *lex domicilii* should be allowed to affect the question; see note (*t*), *infra*.

(*s*) *Mackintosh* v. *Townsend* (1809), 16 Ves. 330. Compare *Oliphant* v. *Hendrie* (1784), 1 Bro. C. C. 571; *A.-G.* v. *Stewart* (1817), 2 Mer. 143; *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124. The Mortmain and Charitable Uses Acts, 1888 and 1891 (51 & 52 Vict. c. 42; 54 & 55 Vict. c. 73), do not apply to Scotland or Ireland; compare *Mackintosh* v. *Townsend, supra*, for the Mortmain Act, 1736 (9 Geo. 2, c. 36).

(*t*) *Canterbury Corporation* v. *Wyburn, supra*. In this case the Judicial Committee held that a domiciled Victorian could validly leave money by will to an English corporation to be laid out in the purchase of land in England for charitable purposes, on the ground that the English legislature cannot be taken to have intended to affect a will subject to the law of Victoria. The *ratio decidendi* appears to be that the transaction must be divided into two parts, the first of which extended to the time when the corporation received the money from the personal representatives of the deceased, and was governed by the law of the latter's domicil; the second being that in which the money (by this time the property of the corporation) was applied in the purchase of English land—an application which (it was said) is valid by English law, since there is nothing to prevent an English corporation holding the necessary licence in mortmain from purchasing English land with its own money. But it is respectfully submitted that the transaction must be considered as a whole, and that to split it up in this way is a fallacious method of reasoning; and it is conceived that *A.-G.* v. *Mill* (1827), 3 Russ. 328; (1831) 2 Dow & Cl. 393, H. L., supports this view. In that case the House of Lords held that a bequest of personalty to be laid out in the purchase of English land for charitable purposes was void. The testator's domicil is not stated in the report, but in *Canterbury Corporation* v. *Wyburn, supra*, it was assumed to be English, although this does not appear to have been the case (see Westlake, Private International Law, p. 206). On principle it is difficult to see how domicil can affect the question, since the object of the Mortmain Acts was two-fold—first, to prevent testators from disinheriting their heirs in favour of charities; and, secondly, to prevent English land from coming into mortmain. The latter at any rate of these evils may be produced whatever the testator's domicil may happen to be (see *A.-G.* v. *Stewart* (1817), 2 Mer. 143, at p. 162, *per* GRANT, M.R.). In *A.-G.* v. *Mill, supra*, the House of Lords did not discuss the question of domicil at all. The decision went entirely on the ground that the land to be bought was English land, and this would suggest that the question of domicil was considered to be immaterial.

(*a*) See *Curtis* v. *Hutton* (1808), 14 Ves. 537; *A.-G.* v. *Mill, supra*. Compare *Sorresby* v. *Hollins* (1740), 9 Mod. Rep. 221.

(*b*) See *A.-G.* v. *Mill, supra*.

both these cases the intention to give such an option need not be expressed, provided it can be gathered from the instrument as a whole (*c*).

Where the lands which are to be brought into mortmain are situated abroad, any disposition of such lands is governed entirely by the local law, and subject thereto there is nothing to prevent the charity, whether English or foreign, from taking the lands or the proceeds thereof (*d*).

SECT. 4.—*Prescription and Limitation of Actions.*

Lapse of time.

320. The effect of lapse of time upon the right to recover immovables, or any right in respect thereof, is governed entirely by the *lex loci rei sitæ* (*e*). Where by such law a person's title to the immovable is extinguished, it will be looked upon as extinguished by the courts of this country (*f*); and with regard to any rights in respect of foreign immovables, or the proceeds or rents and profits thereof, which are capable of being sued upon in this country (*g*), the courts will not hold the right to recover to be barred, if it is not so barred by the local law (*h*).

(*c*) "If it was the intention of the testator to give his trustees power to lay out the residue of his personal estate in the purchase of lands either in Scotland or England, the gift to charity will be good; and it is perfectly clear that it is not necessary that the testator should have expressed in positive and distinct terms that the trustees were to have that option. If I could collect from any part of the will that it was his meaning or in his contemplation that his trustees should have an option of buying lands and rents of inheritance either in Scotland or in England, I should give effect to his intention. . . . Looking, however, at every part of the will—a will, let it be recollected, made in England and in English form, and which says nothing as to the laying out of money in Scots purchases—I do not see enough to induce me to suppose that the testator contemplated the purchase of lands in Scotland" (*A.-G.* v. *Mill*, (1827), 3 Russ. 328, at p. 338, *per* Lord LYNDHURST; (1831), 2 Dow & Cl. 393, H.L.).

(*d*) *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124. Compare *A.-G.* v. *Stewart* (1817), 2 Mer. 143, where GRANT, M.R., says, at p. 161, "I conceive that the object of the Statute of Mortmain was wholly political—that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation." The case will, of course, be different where there is a direction that such proceeds shall be used themselves for the purpose of purchasing land in England; see *Curtis* v. *Hutton* (1808), 14 Ves. 537.

(*e*) The principle that all questions respecting the limitation of actions are governed entirely by the *lex fori* was laid down in the most general terms in *Ruckmaboye* v. *Lulloobhoy Mottichund* (1852), 8 Moo. P. C. C. 4, but probably the expressions there used were not intended to cover immovables. If they were, it is conceived that they cannot stand in view of prior and subsequent decisions on the point (see Dicey, Conflict of Laws, 2nd ed., pp. 505, 515; Westlake, Private International Law, 4th ed., p. 210; Foote, Private International Jurisprudence, 3rd ed., pp. 205–208, and cases quoted under this section).

(*f*) *Beckford* v. *Wade* (1805), 17 Ves. 87, P. C. Compare *Re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Pitt* v. *Dacre* (*Lord*) (1876), 3 Ch. D. 295. Where the local law merely bars the remedy but does not extinguish the right, it is uncertain whether the *lex loci rei sitæ* or the *lex fori* will govern (see Dicey, Conflict of Laws, 2nd ed., pp. 515, 516).

(*g*) *E.g.*, an action to recover arrears of an annuity charged on foreign lands (*Pitt* v. *Dacre* (*Lord*), *supra*).

(*h*) *Pitt* v. *Dacre* (*Lord*), *supra*; *Re Peat's Trusts*, *supra*; and see p. 306, *post*.

SECT. 5. Burdens on Immovables.

SECT. 5.—*Burdens on Immovables.*

Incidence of charges.

321. What burdens are to be borne by an immovable is, in the absence of any contract or personal equity, to be determined by the *lex loci rei sitæ* of the immovable. No greater burden can be imposed on an immovable than is imposed by the local law, and where a burden is so imposed no other law can avail to remove it (*i*). Where as between movables and immovables, the former are, by the *lex loci rei sitæ* of the immovables, primarily liable for the debts of a deceased person, the rights and liabilities of the persons respectively entitled to such property will be regulated by that law, without regard to the law of the deceased's domicil (*k*), and where the heir of the immovables pays debts of the deceased, and by doing so is by the local law made a creditor of the personal estate *pro tanto*, he can recover money so paid out of the personal estate, whatever the domicil of the deceased may have been (*l*).

In the converse case, where a burden is imposed on the immovables by the local law, the heir cannot escape such burden merely because by the law of the deceased's domicil it would have fallen primarily on the personalty (*m*); and, similarly, where by the local law heritable property is primarily liable for debts heritably secured, and the personal estate for personal debts, as between heir and executor, either paying debts of the deceased which he was not in the first instance bound to pay can recover from the other; the courts will not marshal against the heir-at-law in favour of legatees so as to throw on the heritable property burdens which by the *lex loci situs* thereof it is not primarily bound to bear (*n*).

SECT. 6.—*Currency and Rate of Interest.*

How payment to be made.

322. Where a sum is charged upon an immovable, the currency in which it is payable is *primâ facie* that of the place where the

(*i*) *Balfour* v. *Scott* (1793), 6 Bro. Parl. Cas. 550; *Brodie* v. *Barry* (1813), 2 Ves. & B. 127; *Johnson* v. *Telford* (1830), 1 Russ. & M. 244; *Dundas* v. *Dundas* (1830), 2 Dow & Cl. 349, H. L.; *Allen* v. *Anderson* (1846), 5 Hare, 163; *Harrison* v. *Harrison* (1873), 8 Ch. App. 342; *Baring* v. *Ashburton* (1886), 54 L. T. 463. And compare *Re Moses, Moses* v. *Valentine*, [1908] 2 Ch. 235, where a tenant for life of leaseholds in the Transvaal was held entitled to enjoy them *in specie*, there being no obligation to convert placed on the trustees by the local law.

(*k*) *Winchelsea* (*Earl*) v. *Garetty* (1838), 2 Keen, 293. Compare *Balfour* v. *Scott* (1793), 6 Bro. Parl. Cas. 550, where, however, an heir who, by the *lex loci rei sitæ* of the immovable, was not allowed to take the intestate's real estate and at the same time claim a share of the personalty as there were in existence persons of the same degree of relationship to the deceased as himself, was nevertheless allowed to claim such share, his rights thereto being governed only by the law of the deceased's domicil.

(*l*) *Winchelsea* (*Earl*) v. *Garetty*, *supra*.

(*m*) *Drummond* v. *Drummond* (1799), 6 Bro. Parl. Cas. 601; *Elliot* v. *Minto* (*Lord*) (1821), Madd. & G. 16. Compare *Re Hewit, Lawson* v. *Duncan*, [1891] 3 Ch. 568.

(*n*) *Harrison* v. *Harrison*, *supra*. As to the question whether or not a will insufficient to pass immovables, but valid as to movables by the *lex domicilii*, is to be read against the heir for the purpose of putting him to an election, see *Brodie* v. *Barry* (1813), 2 Ves. & B. 127; *Trotter* v. *Trotter* (1828), 4 Bli. (N. S.) 502, H. L.; *Dundas* v. *Dundas* (1830), 2 Dow & Cl. 349, H. L.; *Johnson* v. *Telford* (1830), 1 Russ. & M. 244; *Allen* v. *Anderson* (1846), 5 Hare, 163; *Baring* v. *Ashburton* (1886), 54 L. T. 463. Compare *Dewar* v. *Maitland* (1866), L. R. 2 Eq. 834; and see p. 231, *post*.

SECT. 6. Currency and Rate of Interest.

immovable is situated (*o*), and any interest payable on such part of the sum as may remain unraised is *primâ facie* payable in the local currency and carries interest at the rate fixed by the local law (*p*).

Interest.

But where the sum is to be raised partly out of lands in England and partly out of lands abroad, the English rate of interest is payable (*q*). And where the instrument charging the sum upon the immovable shows the intention of the settlor, the currency in which the money is to be paid and the rate of interest payable is governed by that intention (*r*). Such intention may be express or implied—*e.g.*, where in the case of a will the testator, the beneficiaries, and the trustee reside in England, and the will is made in England, an intention will be presumed that the sum charged is to be paid in England in English currency (*s*), and in the case of a gross sum charged on foreign land, where the instrument is made in England and the parties live there, interest at the English rate must be paid, without deducting anything for the difference in the exchange (*t*).

Part V.—Movables.

SECT. 1.—*Assignment.*

Assignment of movables.

323. An assignment of a movable which gives a good title according to the law of the country where it is situated, is recognised as valid in England, whatever the domicil of the parties may be (*a*),

(*o*) *Lansdowne* (*Marchioness*) v. *Lansdowne* (*Marquis*) (1820), 2 Bli. 60, H. L.; *Holmes* v. *Holmes* (1830), 1 Russ. & M. 660; but see *Stapleton* v. *Conway* (1750), 1 Ves. Sen. 427 (where the question was said to be in the discretion of the court).

(*p*) *Balfour* v. *Cooper* (1883), 23 Ch. D. 472, C. A.

(*q*) *Young* v. *Waterpark* (*Lord*) (1842), 13 Sim. 199; see this case explained in *Balfour* v. *Cooper*, *supra*.

(*r*) *Phipps* v. *Anglesea* (*Earl*) (1721), 1 P. Wms. 696; *Wallis* v. *Brightwell* (1722), 2 P. Wms. 88; *Lansdowne* (*Marchioness*) v. *Lansdowne* (*Marquis*), *supra*.

(*s*) *Wallis* v. *Brightwell*, *supra*.

(*t*) *Phipps* v. *Anglesea* (*Earl*), *supra*; compare *Stapleton* v. *Conway* (1750), 1 Ves. Sen. 427.

(*a*) As regards capacity, there can be no doubt, although there is no direct authority in point (see Dicey, Conflict of Laws, 2nd ed., pp. 519 *et seq.*). The expressions used in the cases cover all the elements of assignment; see *Cammell* v. *Sewell* (1858), 3 H. & N. 617; (1860), 5 H. & N. 728, Ex. Ch.—"If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere," *per* CROMPTON, J., 5 H. & N. at p. 744, a statement of the law referred to with approval by BLACKBURN, J., in *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, at p. 429, who said, "It may very well be said that the rule commonly expressed by English lawyers that a judgment *in rem* is binding everywhere is in truth but a branch of that more general principle"; compare *Lee* v. *Abdy* (1886), 17 Q. B. D. 309, and generally the cases cited under this section. A title so acquired overrules a title acquired under the law of the assignor's domicil (see *Alcock* v. *Smith*, [1892] 1 Ch. 238, C. A.): "As to personal chattels, it is settled that the validity of a transfer depends not upon the law of the domicil of the owner but upon the law of the country where the transfer takes place," *per* KAY, L.J., at p. 267; compare *Dulaney* v. *Merry & Son*, [1901] 1 K. B. 536, at p. 542, *per* CHANNELL, J., and *Re Queensland Mercantile and Agency Co.*, *Ex parte Australasian Investment Co.*, *Ex parte Union Bank of Australia*, [1891] 1 Ch. 536, at p. 545, *per*

SECT. 1. Assignment.

and, conversely, an assignment of a movable situate in England may be invalid unless it complies with the forms required by English law (*b*). Thus, it lies with the law of the place where an instrument is situated to determine whether it is negotiable or not (*c*), and, similarly, where by the *lex loci rei sitæ* of a movable a *bonâ fide* purchaser for value gets a good title, such title is recognised by the English courts (*d*); but where there is by that law a duty on the assignee to make inquiries, failure to do so leaves him bound by earlier rights (*e*), unless the person entitled to them has purposely done something to conceal them (*f*).

Pledges.

324. A pledge which by the *lex loci rei sitæ* is validly created is recognised as valid in this country (*g*), although where a local Act in the nature of the Factors Acts only protects a sale, a pledge does not confer any better title than the pledgor can give (*h*). Where, by the law of the country where a movable is pledged, the pledgee may redeliver the goods to the pledgor for certain purposes, he will retain his right to the security as against persons claiming under a subsequent assignment in the same country (*i*).

NORTH, J.; affirmed [1892] 1 Ch. 219, C. A. The *dicta* of Lord LOUGHBOROUGH in *Sill* v. *Worswick* (1791), 1 Hy. Bl. 665, at p. 690, are too wide if applied to anything but beneficial succession to movables (see Dicey, Conflict of Laws, 2nd ed., *loc. cit.*; Westlake, Private International Law, 4th ed., pp. 195 *et seq.*). For a contrary opinion, see *Liverpool Marine Credit Co.* v. *Hunter* (1867), L. R. 4 Eq. 62; (1868) 3 Ch. App. 479, at p. 483, *per* Lord CHELMSFORD, L.C.

(*b*) *Thorne* v. *Watkins* (1750), 2 Ves. Sen. 35, where a foreign grant of administration was held not to give a right to sue for debts owing to the deceased in England without an English grant; compare *Re Chatard's Settlement*, [1899] 1 Ch. 712, where a foreign guardian entitled to receive an infant's movables under the law of the latter's domicil was held not to be entitled as of right to a fund in court standing to the infant's credit. Compare *Re Crichton's Trust* (1855), 24 L. T. (o. s.) 267; *Re Garnier* (1872), L. R. 13 Eq. 532; *Re Barlow's Will* (1887), 36 Ch. D. 287, C. A.; *Re De Linden, Re Spurrier's Settlement, De Hayn* v. *Garland*, [1897] 1 Ch. 453; *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15, C. A., all cases in which guardians of foreign infants or curators of foreign lunatics claimed movables in England belonging to such infants or lunatics. Compare also *Re Brown's Trust* (1865), 12 L. T. 488, where, however, a fund in court was paid out to a foreign guardian apparently without any inquiry. But the report of this case is not satisfactory (see *Re Chatard's Settlement, supra, per* KEKEWICH, J., at p. 717). For assignments valid by the law of the domicil, see note (*o*), p. 215, *post*.

(*c*) See *Williams* v. *Colonial Bank* (1887), 36 Ch. D. 659; (1888) 38 Ch. D. 388, C. A.; (1890) 15 App. Cas. 267; and *A.-G.* v. *Glendining* (1904), 92 L. T. 87; and compare *Embiricos* v. *Anglo-Austrian Bank*, [1904] 2 K. B. 870; [1905] 1 K. B. 677, C. A. See further, title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 561.

(*d*) See *Hooper* v. *Gumm, McLellan* v. *Gumm* (1867), 2 Ch. App. 282; *City Bank* v. *Barrow* (1880), 5 App. Cas. 664; *Embiricos* v. *Anglo-Austrian Bank, supra;* and compare *Alcock* v. *Smith*, [1892] 1 Ch. 238, C. A. In *Freeman* v. *East India Co.* (1822), 5 B. & Ald. 617, the purchaser was *malâ fide;* see this case explained in *Cammell* v. *Sewell* (1860), 5 H. & N. 728, 745, Ex. Ch.

(*e*) *Hooper* v. *Gumm, supra.*

(*f*) *Ibid;* in such a case express notice is necessary (*ibid.*).

(*g*) *City Bank* v. *Barrow* (1880), 5 App. Cas. 664; *Inglis* v. *Robertson*, [1898] A. C. 616; compare *North Western Bank* v. *Poynter, Son, & Macdonalds*, [1895] A. C. 56. See title BAILMENTS, Vol. I., p. 523.

(*h*) *City Bank* v. *Barrow, supra.*

(*i*) *North Western Bank* v. *Poynter, Son and Macdonalds*, [1895] A. C. 56, explained in *Inglis* v. *Robertson*, [1898] A. C. 616.

SECT. 1. Assignment.

Stoppage *in transitu.*

325. Wherever by the law of the place where goods are shipped and where the ship is, a shipper is entitled to exercise a right of stoppage *in transitu*, and has exercised that right in a manner recognised as valid by such law, his title to the goods will be recognised in this country (*k*).

Bills of sale.

326. A bill of sale, which by the law of the place where the goods are situated does not require registration, is regarded in England as capable of passing the property in them without registration (*l*), and a deed of assignment in favour of creditors executed in a foreign country is capable of passing the property in movables in England without registration (*m*).

Title good by law of domicil.

Special formalities required by *lex situs.*

327. Although a title acquired under the law of the place where the goods are situated takes precedence of a title acquired under the law of the assignor's domicil (*n*), yet a title acquired under the latter law is probably valid in cases where there is no conflict between it and a title acquired under the former law (*o*); but when by the law of the country where movables are situated, or, in the case of registered stock or trade marks, where the register is kept, special formalities are to be observed in order to effect a valid assignment, no assignment made without such formalities will be recognised as valid (*p*).

Judgments *in rem.*

328. A valid judgment (*q*) *in rem*, pronounced by a court having competent jurisdiction (*r*), in respect of a movable, is binding on the whole world (*s*); and even where no adjudication on status is made by the judgment itself, yet an order of a competent court directing

(*k*) *Inglis* v. *Usherwood* (1801), 1 East, 515, where the shippers were held entitled to stop the goods although they had been shipped on a vessel chartered by the consignee, the local law allowing them to do so. See title CARRIER, Vol. IV., p. 1.

(*l*) *Brookes* v. *Harrison* (1880), 6 L. R. Ir. 85. See title BILLS OF SALE, Vol. III., p. 1.

(*m*) Since the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), does not apply to foreign deeds (*Dulaney* v. *Merry & Son*, [1901] 1 K. B. 536).

(*n*) See note (*a*), p. 213, *ante.*

(*o*) Dicey, Conflict of Laws, 2nd ed., pp. 525 *et seq.* See *Sill* v. *Worswick* (1791), 1 Hy. Bl. 665, 690; *Liverpool Marine Credit Co.* v. *Hunter* (1867), L. R. 4 Eq. 62; (1868) 3 Ch. App. 479.

(*p*) See *Dulaney* v. *Merry & Son*, *supra*, at p. 542, *per* CHANNELL, J.; Dicey, Conflict of Laws, 2nd ed., p. 527; *Robinson* v. *Bland* (1760), 2 Burr. 1077, 1079; and compare *Rey* v. *Lecouturier*, [1908] 2 Ch. 715. See also title COMPANIES, Vol. V.

(*q*) For the validity of foreign judgments *in rem*, see p. 295, *post.*

(*r*) *I.e.*, a court within whose jurisdiction the movable is locally situate, and which by the local law has jurisdiction over it (see *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, judgment of BLACKBURN, J.; *Cammell* v. *Sewell* (1858), 3 H. & N. 617). A foreign court has no jurisdiction to determine what ought to be the entries in the register of trade marks in England, or to affect the goodwill of a business in England. See *Rey* v. *Lecouturier*, *supra.* For jurisdiction over ships, see title SHIPPING AND NAVIGATION.

(*s*) *Imrie* v. *Castrique* (1860), 8 C. B. (N. S.) 1, 405, Ex. Ch.; (1870) L. R. 4 H. L. 414; *Liverpool Marine Credit Co. v. Hunter*, *supra*; *Alcock* v. *Smith*, [1892] 1 Ch. 238, C. A.; *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London and China*, [1897] 1 Q. B. 55, 460, C. A. It makes no difference if the judgment proceeded on an erroneous view of English or any other law (see *Imrie* v. *Castrique*, *supra*), but possibly if the foreign court deliberately disregarded a title validly acquired under English law, the judgment would not be held binding in this country (see (1870), L. R. 4 H. L. 414, at p. 436, *per* BLACKBURN, J.). Where the judgment is not *in rem* but *inter partes*,

SECT. 1. Assignment.

a sale is effectual to create a good title in a person purchasing under such sale (*t*). Where the sale takes place first, a subsequent decree confirming it has the same result (*a*).

Effect in England of assignment by foreign statute.

329. Where a person carries on a business in England, a law passed by a foreign Government (or the judgment of a foreign court) vesting in another the goodwill and property of such business cannot justify that other in holding out his goods in England as the same as those made by the first (*b*).

if it is arrived at in such a manner it is not binding in England (see *Simpson* v. *Fogo* (1860), 1 John. & H. 18; (1863) 1 Hem. & M. 195 *sed cf.*, the expressions of BLACKBURN, J., in *Imrie* v. *Castrique*, *supra*, *loc. cit.*). An English adjudication in bankruptcy vests in the trustee movable property of the bankrupt, wherever situated (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20 (1), and s. 168). Under the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), s. 102, an act and warrant of confirmation vests as from the date of the sequestration the movable estate of the bankrupt, wheresoever situated, without the necessity of taking possession, but subject to preferable securities at the date of sequestration. By the Bankruptcy and Insolvency (Ireland) Act, 1857 (20 & 21 Vict. c. 60), s. 267, an adjudication in bankruptcy vests all the personal estate of the bankrupt, wheresoever situate, and all debts due to him, in the assignee. Where, after adjudication in an English bankruptcy, a creditor residing in England recovers property of the bankrupt by an action in a foreign court, the trustee may recover it from him as money had and received (*Hunter* v. *Potts* (1791), 4 Term Rep. 182; *Sill* v. *Worswick* (1791), 1 Hy. Bl. 665; *Phillips* v. *Hunter* (1795), 2 Hy. Bl. 402, Ex. Ch.; *Royal Bank of Scotland* v. *Cuthbert* (1813), 1 Rose, 462; *Selkrig* v. *Davies* (1814), 2 Rose, 291, H. L.; compare *Scott* v. *Bentley* (1855), 1 K. & J. 281; *Cockerell* v. *Dickens* (1840), 1 Mont. D. & De G. 45, P. C.). But where a judgment *in rem* has been pronounced by the foreign court, a title acquired thereunder is valid as against the trustee claiming under a prior adjudication (see *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London and China*, [1897] 1 Q. B. 55, 460, C. A.; and distinguish *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557, where the judgment was not *in rem*). Movables in England vest in the assignee in a foreign bankruptcy when the bankrupt is domiciled in the country where the adjudication takes place (*Re Blithman* (1866), L. R. 2 Eq. 23), but not when he is domiciled elsewhere (*Re Hayward*, *Hayward* v. *Hayward*, [1897] 1 Ch. 905), unless he was adjudicated a bankrupt on his own petition (*Re Davidson's Settlement Trusts* (1873), L. R. 15 Eq. 383; *Re Lawson's Trusts*, [1896] 1 Ch. 175). See further title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 59 *et al.* For the effect of condemnation by a foreign prize court, see title PRIZE LAW AND JURISDICTION.

(*t*) *Cammell* v. *Sewell* (1858), 3 H. & N. 617; (1860) 5 H. & N. 728, Ex. Ch.; *Liverpool Marine Credit Co.* v. *Hunter* (1867), L. R. 4 Eq. 62; (1868) 3 Ch. App. 479; *Alcock* v. *Smith*, [1892] 1 Ch. 238, C. A.; *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London and China*, [1897] 1 Q. B. 55, 460, C. A.; compare *Imrie* v. *Castrique* (1860) 8 C. B. (N. S.) 1, 405, Ex. Ch.; (1870) L. R. 4 H. L. 414. In *The Segredo* (otherwise *Eliza Cornish*) (1853), 1 Ecc. & Ad. 36, it was held that in the case of a sale by the master of a ship the law maritime, and not the *lex loci rei sitæ*, must govern, although the sale was ordered by competent local authorities. But the order of the authorities does not appear to have been equivalent to a judgment *in rem*, but was merely an administrative act carried out in an irregular manner. The reported evidence as to what the foreign law actually was is unsatisfactory. See this case discussed by Westlake, Private International Law, 4th ed., pp. 186—189.

(*a*) *Cammell* v. *Sewell*, *supra*.

(*b*) *Ivey* v. *Lecouturier*, [1908] 2 Ch. 731. An ordinance by a foreign Government sequestrating all debts due from its own subjects to British subjects is not a valid assignment, since it is contrary to the usage of nations, and a debtor paying his debt to someone other than the creditor in obedience to such an order does not get a good discharge as against the creditor (*Wolff* v. *Oxholme* (1817), 6 M. & S. 92).

SECT. 2.—*Documents of Title and Choses in Action.*

SECT. 2. Documents of Title and Choses in Action.

Assignment of documents of title.

330. The rights of the assignor and the assignee on an assignment in one country of a document of title to a debt or to an interest in personal property, are in general governed by the law of the country where the assignment takes place, although the debt may be due from persons living in, or the personal property may be situated in, a foreign country (*c*). The validity of an assignment of documents, such as policies of insurance (*d*) or negotiable instruments (*e*), is determined by the law of the place where the assignment is made (*f*).

Assignment of bare choses in action.

331. The assignment of debts and other choses in action which are not represented by any document, is in general governed by the law of the *forum* in which the chose is to be reduced into possession (*g*), and any provision of that law by which notice of the assignment is necessary in order to perfect the title of the assignee will be recognised in this country (*h*). But where an interest in

(*c*) *Alcock* v. *Smith*, [1892] 1 Ch. 238, C. A., at p. 255, *per* ROMER, J. In *Inglis* v. *Robertson*, [1898] A. C. 616, a pledgee of documents of title was postponed to a creditor obtaining the goods by a subsequent arrestment, since the law of the place where the goods were situated required an assignee of documents of title to give notice to the holder of the goods, which had not been done. But in this case the pledgee did not get a good title under the law of the place where the pledge was made, the Factors Acts having no application in the circumstances. Had the pledgee acquired a good title under them, the regulations of the *lex loci situs* of the property could not have affected it. For the principle on which a debt is said to have a locality, see *Commissioner of Stamps* v. *Hope*, [1891] A. C. 476, P. C., at p. 481, and compare *Winans* v. *R.* (1908), 24 T. L. R. 445, C. A.

(*d*) *Lee* v. *Abdy* (1886), 17 Q. B. D. 309.

(*e*) *Alcock* v. *Smith*, *supra*; *Embiricos* v. *Anglo-Austrian Bank*, [1904] 2 K. B. 870; [1905] 1 K. B. 677, C. A. As to negotiable instruments in general as affected by the conflict of laws, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 561.

(*f*) *Lee* v. *Abdy*, *supra*; *Alcock* v. *Smith*, *supra*; *Embiricos* v. *Anglo-Austrian Bank*, *supra*; and distinguish *Lacave* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148, where a necessary step in the alleged acquisition of title took place in England, thereby invalidating the whole transaction; see also *Williams* v. *Colonial Bank* (1887), 36 Ch. D. 659; (1888) 38 Ch. D. 388, C. A.; (1890) 15 App. Cas. 267. To this extent documents of title etc. are looked upon as corporeal movables, and the assignment of them is governed by different rules to that of bare choses in action, as to which see next note. The same rules as to the effect of foreign judgments and the validity of foreign assignments apply to such documents as apply to strictly corporeal movables, for which see par. 328, *ante* (see *Alcock* v. *Smith*, *supra*; *Embiricos* v. *Anglo-Austrian Bank*, *supra*; Dicey, Conflict of Laws, 2nd ed., p. 533; and distinguish *Wolff* v. *Oxholme* (1817), 6 M. & S. 92).

(*g*) *I.e.*, the place where the debtor is resident (*Re Queensland Mercantile and Agency Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. 219, C. A.); compare *Kelly* v. *Selwyn*, [1905] 2 Ch. 117. See also cases cited in note (*c*), *supra*, and *The Milford* (1858), Sw. 362; *The Jonathan Goodhue* (1859), Sw. 524; *The Tagus*, [1903] P. 44; and distinguish *The Halley* (1867), L. R. 2 A. & E. 312. See also *Peillon* v. *Brooking* (1858), 25 Beav. 218, where the court refused to remove a restraint on anticipation on property belonging to a married woman domiciled abroad, although by the law of her domicil no such restraint was recognised. The forum in this case was English, as the trustees resided in England. See further p. 245, *post*. For assignment of trade marks and registered stock see note (*r*) on p. 215, *ante*; an assignment of goodwill must (*semble*) be valid by the law of the place where the business is carried on. This seems to follow from *Rey* v. *Lecouturier*, [1908] 2 Ch. 731.

(*h*) *Re Queensland Mercantile and Agency Co.*, *supra*, where the debenture was

SECT. 2. Documents of Title and Choses in Action.

English trust funds (the trustees being in England) is assigned in a country by the law of which notice to the trustees need not be given, and the assignee does not in fact give such notice, he will be postponed to a subsequent assignee who does give notice (*i*).

When the law governing the assignment of a chose in action allows an assignee to sue in his own name, his right to do so will be recognised in this country (*k*).

Part VI.—Succession.

SECT. 1.—*Succession to Immovables.*

SUB-SECT. 1.—*Intestate Succession.*

Intestate Succession to immovables.

332. The persons entitled to succeed to immovable property (*l*) belonging to an intestate are determined by the *lex loci rei sitæ* (*m*). Thus, the rights of a widow in respect of immovable property belonging to her husband are determined by that law (*a*). English freeholds descend to the persons entitled by English law to succeed to them (*b*), and no one who was not born in wedlock can succeed on an intestacy to real property in England (*c*).

But, as regards chattel interests in English land, the persons entitled to succeed are determined by the Statute of Distributions (*d*),

postponed as being an assignment without notice, the arrestment being an assignment with notice. Compare *Inglis* v. *Robertson*, [1898] A. C. 616; *Kelly* v. *Selwyn*, [1905] 2 Ch. 117.

(*i*) *Kelly* v. *Selwyn*, *supra*. It seems uncertain whether this case was decided on the ground that the trustees were resident in England, or on the ground that the fund was an English trust fund. See title TRUSTS AND TRUSTEES.

(*k*) *O'Callaghan* v. *Thomond* (*Marchioness*) (1810), 3 Taunt. 82; compare *Alivon* v. *Furnival* (1834), 1 Cr. M. & R. 277. See title CHOSES IN ACTION, Vol. IV., p. 359.

(*l*) See pp. 196 *et seq.*, *ante*.

(*m*) *Balfour* v. *Scott* (1793), 6 Bro. Parl. Cas. 550; *Drummond* v. *Drummond* (1799), 6 Bro. Parl. Cas. 601; *Dalhousie* (*Countess*) v. *M'Douall* (1840), 7 Cl. & Fin. 817, H. L.; *In the Goods of Gentili* (1875), I. R. 9 Eq. 541; *Duncan* v. *Lawson* (1889), 41 Ch. D. 394. Compare *Doe* d. *Birtwhistle* v. *Vardill* (1826), 5 B. & C. 438; (1835) 2 Cl. & Fin. 571, H. L., 582; (1840) 7 Cl. & Fin. 895, H. L.

(*a*) *Re James Rea*, *Rea* v. *Rea*, [1902] 1 I. R. 451.

(*b*) *Dunvan* v. *Lawson*, *supra*; *In the Goods of Gentili*, *supra*. Compare *De Fogassieras* v. *Duport* (1881), 11 L. R. Ir. 123; *Re Hernando*, *Hernando* v. *Sawtell*, (1884), 27 Ch. D. 284.

(*c*) *Doe* d. *Birtwhistle* v. *Vardill*, *supra*. Compare *Fenton* v. *Livingstone* (1859), 3 Macq. 497, H. L.; *Re Goodman's Trusts* (1881), 17 Ch. D. 266, C. A. For the connection, if any, of this rule with the subject of private international law, see Westlake, Private International Law, 4th ed., pp. 216—218. In the converse case, no one but the issue of a bastard can succeed *ab intestato* to his English real estate (*Re Don's Estate* (1857), 4 Drew. 194). In both cases the rule is limited to intestacy (*Re Grey's Trusts*, *Grey* v. *Stamford*, [1892] 3 Ch. 88). For the validity of marriage, see p. 252, *post*; and for legitimacy, see p. 272, *post*.

(*d*) 22 & 23 Car. 2, c. 10. See *Duncan* v. *Lawson* (1889), 41 Ch. D. 394. The right to administration follows the right of succession, and the administrator in the case of English leaseholds will be chosen from among the next of kin according to English law (*Duncan* v. *Lawson*, *supra*, *per* KAY, J., at p. 397). Compare *In the Goods of Gentili* (1875), I. R. 9 Eq. 541. For the purpose of appointing executors a will must be valid by the law of the domicil, but where a will not so valid is valid to pass chattels real administration with the will annexed will be granted, but limited to the chattels real within the jurisdiction

and among them are included persons who are recognised by English law as legitimated *per subsequens matrimonium* (*e*).

SUB-SECT. 2.—*Wills of Immovables.*

Law governing wills relating to immovables.

333. The validity of a will of immovables is determined in every respect, whether as regards capacity, form, or material validity, by the *lex loci rei sitæ* (*f*). Thus, a will of real estate in England must comply with the provisions of the Wills Act, 1837 (*g*), and a will of English leaseholds made by a person who is not a British subject must in every case be in the form required by that Act (*h*).

Leaseholds.

But a will of English leaseholds made out of the United Kingdom by a British subject (*i*) is valid for the purpose of being admitted to probate, and also to pass the beneficial interest (*k*), if made in accordance with the form required by the law either of the place where it is made or of the domicil of the testator, or by the law at the time in force in that part, if any, of the British dominions in which he had his domicil of origin (*l*).

A will of English leaseholds made within the United Kingdom by

(*De Fogassieras* v. *Duport* (1881), 11 L. R. Ir. 123). Where a will is invalid to pass English leaseholds, they will nevertheless vest in an administrator with the will annexed, although the beneficial interest will go according to the Statute of Distributions (*Pepin* v. *Bruyère*, [1900] 2 Ch. 504, [1902] 1 Ch. 24, C. A.; and see, further, titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS).

(*e*) *Re Goodman's Trusts* (1881), 17 Ch. D. 266, C. A., legitimacy being a question of status and therefore to be determined with reference to the personal law. See *Re Andros, Sanders* v. *Andros* (1883), 24 Ch. D. 637, and cases quoted in note (*e*), p. 224, *post*, and note (*k*), p. 231, *post*. For legitimacy, see p. 272, *post*.

(*f*) For capacity, see Dicey, Conflict of Laws, 2nd ed., p. 501; *Birtwhistle* v. *Vardill*, cited in note (*m*) on p. 218, *ante*; *Re Hernando, Hernando* v. *Sawtell* (1884), 27 Ch. D. 284. For form, see *Coppin* v. *Coppin* (1725), 2 P. Wms. 290; *Drummond* v. *Drummond* (1799), 6 Bro. Parl. Cas. 601; *In the Goods of Gentili* (1875), I. R. 9 Eq. 541; *De Fogassieras* v. *Duport, supra*; *Re Hernando, Hernando* v. *Sawtell, supra*; *Duncan* v. *Lawson* (1889), 41 Ch. D. 394; *Pepin* v. *Bruyère*, [1900] 2 Ch. 504; [1902] 1 Ch. 24; and compare *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 584. For material validity, see *Freke* v. *Carbery* (*Lord*) (1873), L. R. 16 Eq. 461; *Duncan* v. *Lawson, supra*; *Re Piercy, Whitehaven* v. *Piercy*, [1895] 1 Ch. 83, and compare *Re Grassi, Stubberfield* v. *Grassi, supra*.

(*g*) 7 Will. 4 & 1 Vict. c. 26. See *Re Hernando, Hernando* v. *Sawtell, supra*; *Duncan* v. *Lawson, supra*; and compare *Coppin* v. *Coppin, supra*.

(*h*) See *De Fogassieras* v. *Duport, supra*; *Pepin* v. *Bruyère, supra*.

(*i*) This does not include a person born a British subject but naturalised at the time of the will in a foreign country (*Bloxam* v. *Favre* (1883), 8 P. D. 101; (1884) 9 P. D. 130, C. A.). Whether or not it includes a naturalised British subject is doubtful. In *In the Goods of Gatti* (1879), 27 W. R. 323, it was held that it did not. This was a case under 7 & 8 Vict. c. 66, and the *ratio decidendi* was that the letters of naturalisation excluded the rights and privileges of a British subject abroad. This case was not cited, nor was the point taken, in *Re Grassi, Stubberfield* v. *Grassi, supra*, where a will of a naturalised British subject was held to be valid under the section. But it is submitted that in view of the language of s. 7 of the Naturalization Act, 1870 (33 Vict. c. 14) (a certificate under which confers only the rights of a natural-born British subject in the United Kingdom), the same principle should apply to aliens naturalised under that Act. *In the Goods of Gally* (1876), 1 P. D. 438, cited by Dicey, Conflict of Laws, 2nd ed., p. 674, is not in point, as it was a decision under s. 2 of the Wills Act, 1861 (24 & 25 Vict. c. 114).

(*k*) *Re Grassi, Stubberfield* v. *Grassi, supra*.

(*l*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 1. In determining the validity

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a British subject (*m*) is similarly valid, if in point of form it is in accordance with the law of that part of the United Kingdom where it is made (*n*).

A will of immovables must not violate restrictions placed on the disposition of immovables by the *lex loci rei sitæ*, such as, in the case of English land, the perpetuity rule (*o*), the Accumulations Acts, 1799 and 1892 (*p*), and the Mortmain Acts (*q*).

The construction of a will of immovables is, as a general rule, governed by the *lex loci rei sitæ* (*r*).

SECT. 2.—*Succession to Movables.*

SUB-SECT. 1.—*In General.*

Succession to movables governed by *lex domicilii*.

334. Succession to the movables (*s*) of a deceased person is, subject to certain exceptions (*t*), governed by the law of his domicil at the date of his death (*a*). Such law must be taken as it stood at the date of death, and a change in it made after that date does not alter the rights of succession (*b*), whether such change be of a

of a will under this section, regard must be had to the law of one country only at a time (*Pechell* v. *Hilderley* (1869), L. R. 1 P. & M. 673, cited note (*k*), p. 227, *post*). For the case where there is no local provision as to the form of a will, see *Stokes* v. *Stokes* (*Church Missionary Society for Africa and the East* cited) (1898), 67 L. J. (P.) 55.

(*m*) Whether natural-born or naturalised (*In the Goods of Gally* (1876), 1 P. D. 438).

(*n*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 2; *Re Watson, Carlton* v. *Carlton*, [1887] W. N. 142.

(*o*) *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 584, at p. 592, *per* BUCKLEY, J.

(*p*) 39 & 40 Geo. 3, c. 98; 55 & 56 Vict. c. 58; and see *Freke* v. *Carbery* (*Lord*) (1873), L. R. 16 Eq. 461; *Re Grassi, Stubberfield* v. *Grassi, loc. cit.*; and *In re Moses, Moses* v. *Valentine*, [1908] 2 Ch. 235.

(*q*) *A.-G.* v. *Mill* (1827), 3 Russ. 328; (1831) 2 Dow & Cl. 393, H. L. For the material validity of, and restrictions on, alienations *mortis causa* of immovables, see p. 209, *ante*. The same rules apply to wills as to assignments *inter vivos*. For the validity and effect of a direction to convert in a will, see p. 198, *ante*.

(*r*) *Lushington* v. *Sewell* (1827), 1 Sim. 435; *Stewart* v. *Garnett* (1830), 3 Sim. 398, decisions on the question as to what passes under a devise of immovables. But see *Young* v. *Waterpark* (*Lord*) (1842), 13 Sim. 199; *Phipps* v. *Anglesea* (*Earl*) (1721), 1 P. Wms. 696, cases where the currency in which money charged on immovables and interest payable in respect thereof were held not to be necessarily determined by the *lex loci rei sitæ*. For other cases on this subject, see pp. 212, 213, *ante*. In the construction of a will of immovables, the meaning of the word "children" and similar words is a question not of construction, but of status, and therefore to be determined by reference to the personal law (see note (*e*), p. 219, *ante*). This applies even to a devise of English real estate, since the rule in *Birtwhistle* v. *Vardill* (1826), 5 B. & C. 438, only applies to intestacy; see *Re Grey, Grey* v. *Stamford*, [1892] 3 Ch. 88. The law as to the construction of documents relating to immovables is not in a satisfactory state. See Westlake, Private International Law, 4th ed., pp. 209, 210.

(*s*) See p. 196, *ante*.

(*t*) Some of these are introduced by the Wills Act, 1861 (24 & 25 Vict. c. 114), while others relate to the execution of powers of appointment. See below as to both.

(*a*) For the authorities expressing this principle in the case of wills and of intestacy respectively, see the next two sub-sections.

(*b*) *Lynch* v. *Provisional Government of Paraguay* (1871), L. R. 2 P. & D. 268; *Re Ayanoor's Trusts* (1895), 64 L. J. (CH.) 521. It makes no difference if the change in the law is retrospective (*Lynch* v. *Provisional Government of Paraguay*, *supra*).

general description or in the nature of a personal decree (*c*). Thus, in a given case, two questions must be answered before the court can determine who is entitled to succeed (*d*) — first, in what country was the deceased domiciled at the date of his death? and, secondly, what is the law of that country?

What is meant by domicil.

As to the first question (*e*); the domicil that is required is a *de facto* domicil only, and it is not necessary for the deceased to have fulfilled the conditions which, by the law of that country where he is alleged to have died domiciled, are necessary for the acquisition of full civil rights (*f*). But a *de facto* domicil cannot apparently be acquired in a country which does not recognise a *de facto* domicil as entailing any legal consequences (*g*).

As to the second question; when it has been determined in what country the deceased died domiciled, it remains to discover what the law of that country is. Two principles may be laid down with regard to this:—

The courts of the domicil primarily the proper courts to pronounce.

(1) The courts of the domicil are, primarily, the proper courts to determine who is entitled to the movables of the deceased (whether

(*c*) *Re Aganoor's Trusts* (1895), 64 L. J. (CH.) 521.

(*d*) See *Re Martin, Loustalan* v. *Loustalan*, [1900] P. 211, C. A.

(*e*) For a general discussion of domicil, see p. 182, *ante*. The subject is only treated here with regard to certain questions bearing more particularly on succession. Note, that a grant of probate by the English court is in England conclusive that the instrument proved is the last will of the testator, but is not conclusive as to his domicil or as to the material validity or construction of the instrument (*Thornton* v. *Curling* (1824), 8 Sim. 310; *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124; *Bradford* v. *Young* (1884), 26 Ch. D. 656; (1885) 29 Ch. D. 617, C. A.; *De Mora* v. *Concha* (1885), 29 Ch. D. 268; *Pouey* v. *Hordern*, [1900] 1 Ch. 492.

(*f*) *Collier* v. *Rivaz* (1841), 2 Curt 855; *Bremer* v. *Freeman* (1857), 10 Moo. P. C. C. 306; *Laneuville* v. *Anderson* (1860), 2 Sw. & Tr. 24; *Hamilton* v. *Dallas* (1875), 1 Ch. D. 257. See also *Re Bowes, Bates* v. *Wengel* (1906), 22 T. L. R. 711, which is not opposed to this principle, since it was decided on the assumption that French law does not recognise any but a legal domicil. The correctness of this assumption is open to doubt in view of *Collier* v. *Rivaz* and *Hamilton* v. *Dallas* (cited above), in which French law was found to recognise a *domicile de fait* as opposed to a *domicile legal*.

(*g*) *Re Johnson, Roberts* v. *A.-G.*, [1903] 1 Ch. 821, followed in *Re Bowes, Bates* v. *Wengel, supra*. In *Re Johnson, Roberts* v. *A.-G.*, FARWELL, J., appears to have held that the fact that the country in which the deceased is alleged to have died domiciled distributes the goods of intestates who have not acquired a *legal* domicil therein in accordance with the law of their nationality, implies, of itself, a refusal by the law of such country to recognise the possibility of acquiring a *de facto* domicil within its boundaries—at any rate, for the purpose of intestate succession. See his remarks at p. 828, which come perilously near to asserting that a person can be domiciled in a country for one purpose and not for another. This view (it is respectfully submitted) is contrary to the whole conception of domicil, which is regarded by the English courts as an indivisible relation. However that may be, *Re Johnson, Roberts* v. *A.-G., supra*, is an authority for the proposition in the text, and is supported by *Collier* v. *Rivaz* and *Hamilton* v. *Dallas, supra*, where it was found necessary to discuss whether the law of the alleged domicil recognised a *de facto* domicil as distinguished from a legal domicil, implying that, had it not done so, no *de facto* domicil could have been acquired. This doctrine leads to some inconvenient results, one of which is referred to by FARWELL, J., in *Re Johnson, Roberts* v. *A.-G., supra*, at p. 830. Two others may be mentioned here: (1) Would the Baden courts have had jurisdiction to divorce the *de cuius* in *Re Johnson, Roberts* v. *A.-G.*? (2) What would have happened if the "domicil" of origin of the *de cuius* had been in Baden and she had never changed it? Here would have been a person without a domicil, Baden law not recognising domicil and

SECT. 2. **Succession to Movables.**

he died testate or intestate), and where those courts have pronounced the English court must follow them (*h*) without investigating the grounds of their decision (*i*) or requiring further evidence of its validity (*k*).

Where the courts of the domicil have not pronounced.

(2) Where the courts of the domicil have not pronounced, the English courts must decide for themselves, on such evidence as they think proper (*l*), what the law of the domicil is, *i.e.*, whom the courts of the domicil would have declared to be entitled to the property (whether under a will or on an intestacy) if they had been called upon to decide the question (*m*). In arriving at a decision the English court must consider itself to be a court sitting in the country where the deceased died domiciled, and must deal with the question as such a court would have dealt with it (*n*).

Where the law of the domicil refers to some other law.

335. It follows from this that where the courts of the domicil regard the courts of another country (*e.g.*, of the deceased's nationality) as being the courts primarily entitled to pronounce, any pronouncement by them will be followed in England as being equivalent to a pronouncement by the courts of the domicil (*o*). Similarly, where the courts of the domicil would have determined the question by reference to the law of another country, *e.g.*, that of the deceased's nationality (*p*) or of the place where a will was made (*q*), the English courts must be governed by such latter

there being no previous domicil to fall back upon. It is submitted that a principle leading to such results cannot be correct. Professor Dicey, Conflict of Laws, 2nd ed., p. 117, is of opinion that domicil, being a question of fact, cannot be affected by the provisions of any foreign law whatever. This view is (it is submitted) the only reasonable one, although *Hamilton* v. *Dallas* (1875), 1 Ch. D. 257, which Professor Dicey quotes in support of it, is really an authority the other way for the reasons given above.

(*h*) *Larpent* v. *Sindry* (1828), 1 Hag. Ecc. 382; *Moore* v. *Darell and Budd* (1832), 4 Hag. Ecc. 346; *Collier* v. *Rivaz* (1841), 2 Curt. 855; *Laneuville* v. *Anderson* (1860), 2 Sw. & Tr. 24; *Enohin* v. *Wylie* (1862), 10 H. L. Cas. 1; *Re Cosnahan* (1866), L. R. 1 P. & D. 183; *Doglioni* v. *Crispin* (1866), L. R. 1 H. L. 301; *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch. D. 600; and compare *In the Goods of Meatyard*, [1903] P. 125. It does not follow that probate or administration will be granted to the foreign personal representative, though this will usually be done, unless there is some special reason against it. See *In the Goods of H.R.H. the Duchess d'Orléans* (1859), 1 Sw. & Tr. 253; *Enohin* v. *Wylie, supra*; and see title EXECUTORS AND ADMINISTRATORS.

(*i*) *In the Goods of Smith* (1868), 16 W. R. 1130.

(*k*) *Miller* v. *James* (1872), L. R. 3 P. & D. 4.

(*l*) For the evidence on which the court will act in such a case see *In the Goods of Anne Dormoy* (1832), 3 Hag. Ecc. 767; *In the Goods of Klingemann* (1862), 3 Sw. & Tr. 18; *Isherwood* v. *Cheetham* (1862), 7 L. T. 250; *In the Goods of Deshais* (1865), 4 Sw. & Tr. 13.

(*m*) *Collier* v. *Rivaz, supra*; *Enohin* v. *Wylie, supra*; *Doglioni* v. *Crispin, supra*.

(*n*) See the remarks of Sir HUBERT JENNER in *Collier* v. *Rivaz, supra*, at pp. 859, 863.

(*o*) *Re Trufort, Trafford* v. *Blanc, supra*.

(*p*) See *In the Goods of Brown-Séquard* (1894), 70 L. T. 811, where a will in English form made by a natural-born Englishwoman who had previously married a Frenchman and become domiciled in France was held valid, since French law (*lex domicilii*) regarded her as still remaining an Englishwoman for such purposes and determined the validity of her will by reference to the law of her nationality. *Re Johnson, Roberts* v. *A.-G.*, and *Re Bowes, Bates* v. *Wengel* (cited note (*q*), p. 221, *ante*) are not decisions on this point at all, but on the question "what was the domicil of the deceased?" See note referred to.

(*q*) See *Laneuville* v. *Anderson* (1860), 2 Sw. & Tr. 24.

law (*r*). But in deciding the validity of a will the court will have regard to the law of one country only at a time (*s*).

336. The following sub-sections treat more particularly of succession to movables *ab intestato* and under a will, and the

(*r*) *Collier* v. *Rivaz* (1841), 2 Curt. 855; compare *Re Trufort, Trafford* v. *Blanc*, (1887), 36 Ch. D. 600, and cases cited in last two notes. The proposition in the text is the usual form in which the law is stated, but it is submitted that it contains a fallacy. When English law refers the question as to who is entitled to the movables of a deceased to the law of his domicil, that law must be taken in its entirety so as to include not merely the municipal law, but also the rules of private international jurisprudence recognised by the courts of the domicil, *i.e.*, the "law of the domicil" means any principles which the courts of the domicil would have applied to the case. But if the law of the domicil refers the question to some other law, then, according to the proposition in the text, the English court must discover what that law is and must take it in its entirety also, with the result that the question may be once more referred to the law of the domicil, and so on *ad infinitum*. It is submitted, however, that when the courts of the domicil refer the question to some other law, *e.g.*, the law of the nationality, it is the duty of the English court to consider, not that law, but the view of it which the courts of the domicil would have taken if they had been called upon to pronounce. In other words, the English court throws on the law of the domicil the burden of cutting the *circulus inextricabilis*. The way in which it cuts it is part of the law of the domicil. Now it is certain that if the law of the domicil cuts the circle with a judgment as to the persons entitled, the English courts must follow, and it seems unreasonable to say that the way in which the *lex domicilii would* have cut the circle if called upon to do so is any less a part of the *lex domicilii* than the way in which it has, as a fact, cut it with a judgment. An example will make this clearer: A. and B., British subjects, die intestate domiciled in France. A leaves movables in France and England; B. leaves movables in England only. French law determines succession by the law of the nationality. Now, in A.'s case, suppose the French courts have determined who is entitled to his property, their decision will be based on their view of English law, and the English courts will follow it. In B.'s case, however (if the principle stated in the text is correct), the English courts, on being referred back by the law of the domicil to the law of nationality (*i.e.*, English law), will determine who is entitled to succeed by their own view of English law, and not by the view of that law which would have been taken by the French courts. This leads to a perfectly illogical result. The view which the French law takes of English law is the law of the domicil, and, accordingly, the mere fact that that view has been embodied in a judgment pronounced by the French courts should make no difference. It may be objected to this view that in A.'s case the judgment of the French courts may have proceeded on an erroneous view of English law, and that the English courts will only follow it on the principle that foreign judgments are binding, *i.e.*, will follow it although it may be wrong. But it is submitted that this is inaccurate, and that the judgment of the French court will be followed *because it is right* (*i.e.*, because it embodies the law of the domicil, by which succession is regulated), and not, as in the case of other foreign judgments, *although it may be wrong*. If the view taken in this note is correct, the proper question to be asked of French law in B.'s case is not "by what law would your courts have pronounced?"—that would lead into the vicious circle—but "to what persons would your courts have given the movables of the *de cuius* if they had been called upon to decide," *i.e.*, "what do you mean by English law and what is your view of the provisions of that law?" The proposition in the text should then run, "The English courts must be governed by the view which the law of the domicil takes of such latter law." For a discussion of the difficulty which might arise in the improbable event of the law of the domicil refusing to decide the question (and for the whole of this difficult subject), see Dicey, Conflict of Laws, 2nd ed., Appendix I., pp. 715 *et seq.*, and Westlake, Private International Law, 4th ed., ch. ii. *Re Johnson, Roberts* v. *A.-G.* (cited note (*g*), p. 221, *ante*), does not really help towards a solution of the difficulty, for the reasons given in the note referred to.

(*s*) *Pechell* v. *Hilderley* (1869), L. R. 1 P. & D. 673; see note (*k*), p. 227, *post*

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expression "law of the domicil" is used in the extended meaning given to it above.

SUB-SECT. 2.—*Intestate Succession.*

Distribution of movables.

337. The distribution of movable property belonging to an intestate is governed by the law (*t*) of the country where the intestate was domiciled at the date of his death (*u*).

The distribution of choses in action belonging to an intestate is governed by the law of his domicil, and not by that of the *forum* in which they are to be reduced into possession (*a*).

Governed by law of domicil.

The law of the domicil determines every question as to who is entitled to succeed to the movables of the deceased. Thus, the rights of a widow in respect of the movables of an intestate are governed by the *lex domicilii* of the latter (*b*). Similarly, the right of the heir to share in the movable estate cannot be affected by any provision of the *lex loci rei sitæ* of immovables belonging to the deceased (*c*), and if children, whether legitimate or illegitimate, are by the *lex domicilii* entitled to succeed in any case to a part of the deceased's movables, their claim will be enforced in this country (*d*). Children legitimated *per subsequens matrimonium* are entitled to succeed to the movables of an intestate domiciled in England if their father was domiciled both at the date of their birth and at the date of the marriage in a country which recognises such legitimation (*e*).

(*t*) For the meaning of the phrase "law of the domicil" in its widest sense, see pp. 221 *et seq.*, *ante*.

(*u*) *Pipon* v. *Pipon* (1744), Amb. 25; *Bruce* v. *Bruce* (1790), 6 Bro. Parl. Cas. 566; *Hog* v. *Lashley* (1792), 6 Bro. Parl. Cas. 577; *Balfour* v. *Scott* (1793), 6 Bro. Parl. Cas. 550; *Bempde* v. *Johnstone* (1796), 3 Ves. 198; *Somerville* v. *Somerville* (*Lord*) (1801), 5 Ves. 749 a; *De Bonneval* v. *De Bonneval* (1838), 1 Curt. 856; *Craigie* v. *Lewin* (1843), 3 Curt. 435; *Enohin* v. *Wylie* (1862), 10 H. L. Cas. 1; *Doglioni* v. *Crispin* (1866), L. R. 1 H. L. 301; *Blackwood* v. *R.* (1882), 8 App. Cas. 82; *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431; *Re Grove, Vaucher* v. *The Solicitor to the Treasury* (1888), 40 Ch. D. 216, C. A. Questions concerning the grant of administration and payment of debts are governed by the *lex situs* of the movable (*Blackwood* v. *R.*, *supra*). A foreign grant of administration does not give a right to recover movables in England unless an English grant is obtained (*Thorne* v. *Watkins* (1750), 2 Ves. Sen. 35); and for administration in general, see title EXECUTORS AND ADMINISTRATORS. For the possible effect of the Domicile Act, 1861 (24 & 25 Vict. c. 121), on intestate succession to movables, see p. 194, *ante*. For the effect of a change in the law of the domicil after the death *de cuius*, see note (*b*), p. 220, *ante*.

(*a*) *Thorne* v. *Watkins* (1750), 2 Ves. Sen. 35; *Re Clark, McKecknie* v. *Clark*, [1904] 1 Ch. 294.

(*b*) *Re James Rea, Rea* v. *Rea*, [1902] 1 I. R. 451. The Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), applies to Ireland, but not to Scotland.

(*c*) *Balfour* v. *Scott* (1793), 6 Bro. Parl. Cas. 550, where an attempt was made to put the heir of Scots heritable property belonging to a domiciled Englishman dying intestate to his election, Scots law not allowing him in the circumstances to claim a share of personalty without collating realty descending to him. Compare *Brodie* v. *Barry* (1813), 2 Ves. & B. 127, 131. For cases where an heir of foreign immovables taking benefits under a will is put to his election, see note (*h*), p. 231, *post*.

(*d*) *Doglioni* v. *Crispin* (1866), L. R. 1 H. L. 301.

(*e*) *Re Goodman's Trusts* (1881), 17 Ch. D. 266, C. A., disapproving *Boyes* v. *Bedale* (1863), 1 Hem. & M. 798. See also *Re Wright's Trusts* (1856), 2 K. & J. 595; *Skottowe* v. *Young* (1871), L. R. 11 Eq. 474; *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441; *Re Andros, Andros* v. *Andros* (1883), 24 Ch. D. 637; *Re Grey's*

Where there is no one entitled by the *lex domicilii* of the deceased to succeed to his movable property in England, the Crown has an absolute right to such property as *bona vacantia* (*f*).

SUB-SECT. 3.—*Wills of Movables.*

Validity of will.

338. The validity of a will of movables depends in general upon the law of the domicil (*g*) of the deceased at the date of his death (*h*), which determines whether he died testate or intestate (*i*).

Formal validity.

Any instrument (*k*) which has been recognised by the courts of the domicil (*l*) as valid for the purpose of disposing of movables *mortis causa* will be admitted to probate in England (*m*). Thus, where by the law of the domicil a will has no effect, and the movable property of the deceased is distributed according to a disposition made by members of his family and approved by the sovereign in whose dominions he died domiciled, the English court will grant probate of such disposition, and not of any will which the deceased may have made (*m*). Similarly, where the *lex domicilii* does not know of executors, but the courts of the domicil make a

Trusts, *Grey* v. *Stamford*, [1892] 3 Ch. 88; *Re Fergusson's Will*, [1902] 1 Ch. 483; and distinguish *Re Grove*, *Vaucher* v. *The Solicitor to the Treasury* (1888), 40 Ch. D. 216, C. A. See further note (*e*) on p. 219, *ante*, and note (*k*) on p. 231, *post*.

(*f*) This rule is based on the distinction between rights of succession, which are governed by the *lex domicilii*, and the paramount claim of the *fiscus*, which has nothing to do with the rules governing succession and is therefore outside the maxim *Mobilia sequuntur personam*. See *Re Barnett's Trusts*, [1902] 1 Ch. 847; and distinguish *In the Goods of Beggia* (1822), 1 Add. 340, where the Crown did not appear, and *Aspinwall* v. *Queen's Proctor* (1839), 2 Curt. 241, where it was not shown that the goods were *bona vacantia*. See also title CONSTITUTIONAL LAW, Vol. VII.

(*g*) For the meaning of the phrase "law of the domicil," see note (*r*), p. 223, *ante*.

(*h*) *Hare* v. *Nasmyth* (1823), 2 Add. 25; *Stanley* v. *Bernes* (1831), 3 Hag. Ecc. 373; *De Bonneval* v. *De Bonneval* (1838), 1 Curt. 856; *Preston* v. *Melville* (*Viscount*) (1840), 8 Cl. & Fin. 1, H. L.; *Craigie* v. *Lewin* (1843), 3 Curt. 435; *De Zichy Ferraris* (*Countess*) v. *Hertford* (*Marquis*) (1843), 3 Curt. 468, on appeal *sub nom. Croker* v. *Hertford* (*Marquis*) (1844), 4 Moo. P. C. C. 339; *Frere* v. *Frere* (1847), 5 Notes of Cases, 593; *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124; *Crookenden* v. *Fuller* (1859), 29 L. J. (P. M. & A.) 1, corrected on another point in *In the Goods of Alexander* (1860), 29 L. J. (P. M. & A.) 93; *Laneuville* v. *Anderson* (1860), 2 Sw. & Tr. 24; *Enohin* v. *Wylie* (1862), 10 H. L. Cas. 1; *De Fogassieras* v. *Duport* (1881), 11 L. R. Ir. 123; *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431; *Re Martin*, *Loustalan* v. *Loustalan*, [1900] P. 211, C. A. For the effect of a change in the law of the domicil after the death of the *de cuius*, see note (*b*), p. 220, *supra*. For the possible effect of the Domicile Act, 1861 (24 & 25 Vict. c. 121), see p. 194, *ante*.

(*i*) *Campbell* v. *French* (1797), 3 Ves. 321; *Moore* v. *Darell* (1832), 4 Hag. Ecc. 346.

(*k*) Or a duly authenticated copy (*Miller* v. *James* (1872), L. R. 3 P. & D. 4), which should be made in the country of the domicil and authenticated there by the local authorities. If this has not been done, and the original is brought to England, but cannot be left in the Registry, a certified copy made in England will be admitted to probate (*In the Goods of Clarke* (1867), 36 L. J. (P. & M.) 72). Where the court of the domicil grants probate of a translation the English courts decree probate of an English translation of such translation and not of a translation of the original (*In the Goods of Rule* (1878), 4 P. D. 76, from which distinguish *In the Goods of Petty* (1879), 41 L. T. 529); and see further, title EXECUTORS AND ADMINISTRATORS.

(*l*) See note (*h*), p. 222, *ante*.

(*m*) *In the Goods of Oldenburg* (*Prince*) (1884), 9 P. D. 234.

SECT. 2. Succession to Movables.

decree under which a person is entitled to movables in this country, administration will be granted to such person, but limited to the property comprised in the decree (*n*).

Material validity.

339. The law of the domicil (*o*) governs the material validity (*p*) of a will of movables, and determines the restrictions to be placed on alienations *mortis causa* (*q*), although in the case of persons dying since August 6, 1861, a change of domicil made after the execution of the will does not affect its validity (*r*). Thus, a direction in the will of a domiciled Englishman to accumulate income for a longer period than is allowed by the Accumulations Acts, 1800 and 1892 (*s*), is void (*t*), and the same is the case with a legacy given by a domiciled Englishman to superstitious uses, although by the law of the legatee's domicil it would have been valid (*a*), and, generally, wherever a bequest is invalidated by the *lex domicilii* of the testator it will be looked upon as void by the courts of this country (*b*); and where children of the testator are by the law of his domicil entitled to share in his movable estate notwithstanding any testamentary disposition, they will be held to be so entitled by the English court (*c*).

Will made abroad by British subject.

340. A will of movables made out of the United Kingdom by a British subject (*d*) is valid in point of form (*e*), if made in accordance with the forms required either by the law of the place where the testator was domiciled at the date of execution, or by the laws then in force in that part of the British dominions where he had his domicil of origin (*f*). Such a will is also valid in point of form where it is in the form required by the law of the place where it was executed (*f*), or, if such law has no provisions relating to the

(*n*) *In the Goods of Dost Aly Khan* (1880), 6 P. D. 6.

(*o*) In the extended sense indicated on p. 222, *ante*.

(*p*) Probate is no proof of this; see note (*e*), p. 221, *ante*.

(*q*) *Hog* v. *Lashley* (1792), 6 Bro. Parl. Cas. 577; *Thornton* v. *Curling* (1824), 8 Sim. 310; *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124; *Enohin* v. *Wylie* (1862), 10 H. L. Cas. 1. No law save that of the domicil can restrict the power of leaving movables by will (*In the Goods of Maraver* (1828), 1 Hag. Ecc. 498). For a possible exception in the case of money bequeathed for the purpose of bringing English land into mortmain see p. 210, *ante*.

(*r*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3.

(*s*) 39 & 40 Geo. 3, c. 98; 55 & 56 Vict. c. 58.

(*t*) See *Freke* v. *Carbery* (*Lord*) (1873), L. R. 16 Eq. 461.

(*a*) *Re Elliott*, *Elliott* v. *Johnson* (1891), 39 W. R. 297. Where by the *lex domicilii* of the testator marshalling in favour of a charity was allowed, the court also allowed it (*Macdonald* v. *Macdonald* (1872), L. R. 14 Eq. 60).

(*b*) *Campbell* v. *Beaufoy* (1859), John. 320.

(*c*) *Re Trufort*, *Trafford* v. *Blanc* (1887), 36 Ch. D. 600. See also title WILLS.

(*d*) As to the question whether or not this includes a naturalised British subject, see note (*i*) on p. 219, *ante*. The section cannot be taken in combination with s. 2 of the Naturalization Act, 1870 (33 Vict. c. 14), so as to make valid the will of an alien which is not executed in accordance with the law of his domicil, whether he was a British subject by birth or not (*Bloxam* v. *Favre* (1883), 8 P. D. 101), and whether his domicil was English or not (*In the Goods of Keller* (1891), 61 L. J. (P.) 39).

(*e*) And (*semble*) to pass the beneficial interest; see *Re Grassi*, *Stubberfield* v. *Grassi*, [1905] 1 Ch. 584.

(*f*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 1. The principle of *Collier* v. *Rivaz* (1841), 2 Curt. 855, *Re Trufort*, *Trafford* v. *Blanc*, *supra*, and *In the Goods of Brown-Séquard* (1894), 70 L. T. 811 (cited note (*p*), p. 222, *ante*), will apply in

form of wills, then if it is made in a reasonable form (*g*). In these cases the domicil of the testator is immaterial (*h*), and it is unnecessary for the court to inquire what it was (*i*).

Where a will is not valid either by the law of the domicil of the testator or by virtue of the Wills Act, 1861 (*j*), and a codicil is subsequently made, which is in itself valid by the *lex loci actus* but is invalidated by that law as being annexed to an invalid will, such codicil will not have the effect of making the will valid by republication (*k*).

Will made within United Kingdom by British subject.

341. A will of movables made within the United Kingdom by a British subject (*l*), whether natural-born or naturalised (*m*), is valid in point of form if made in accordance with the law at the time in force in the place where it was made (*n*).

Revocation.

342. Whether or not a will is revoked is in general to be determined by the law of the place where the deceased dies domiciled (*o*), but in the case of a marriage taking place after the execution of a will it depends on the law of the domicil of the husband at the date of such marriage (*p*), whether the will is revoked thereby or not (*q*). But the will of a testator, whether he be a British subject or an alien (*r*), dying since the 6th of August, 1861, is not revoked by a change of his domicil taking place after the execution of the will (*s*). Thus, where a person marries after making a will which is valid by the law of his domicil, and subsequently to the marriage becomes domiciled in a country by the law of which marriage revokes a will, his will remains valid, if by the law of the place where the will was made and where the marriage took place marriage does not operate to revoke a will (*t*).

this case also. For the operation of the Act in the case of appointments under powers, see note (*j*), p. 229, *post*.

(*g*) *Stokes* v. *Stokes* (1898), 67 L. J. (P.) 55.

(*h*) But domicil may still be material in the case of the execution of powers of appointment; see note (*j*), p. 229, *post*.

(*i*) *In the Goods of Rippon* (1863), 3 Sw. & Tr. 177.

(*j*) See note (*f*), p. 226, *ante*.

(*k*) *I.e.*, the court will not adopt so much of the *lex loci actus* as makes the codicil valid and reject the rest, but will have regard to such law as a whole (*Pechell* v. *Hilderley* (1869), L. R. 1 P. & D. 673).

(*l*) See *Bloxam* v. *Favre* (1883), 8 P. D. 101; *In the Goods of Keller* (1891), 61 L. J. (P.) 39.

(*m*) *In the Goods of Gally* (1876), 1 P. D. 438.

(*n*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 2.

(*o*) *Campbell* v. *French* (1797), 3 Ves. 321; *Re Martin, Loustalan* v. *Loustalan*, [1900] P. 211, C. A.

(*p*) See *Re Martin, Loustalan* v. *Loustalan, supra*, at p. 234, *per* RIGBY, L.J.; *sed cf.* judgment of VAUGHAN WILLIAMS, L.J., at p. 238.

(*q*) *Re Martin, Loustalan* v. *Loustalan, supra*; compare *In the Goods of Reid* (1866), L. R. 1 P. & D. 74; *In the Estate of Groos*, [1904] P. 269. S. 18 of the Wills Act, 1837 (1 Vict. c. 26), does not apply to the wills of foreigners who die domiciled abroad (*Re Martin, Loustalan* v. *Loustalan, supra*, at p. 233, *per* LINDLEY, M.R.).

(*r*) *In the Estate of Groos, supra*.

(*s*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3.

(*t*) *In the Goods of Reid, supra*; *In the Estate of Groos, supra*. If the marriage takes place after the testator becomes domiciled in a country where marriage revokes a will, whether the will is revoked, *quære*; see *In the Goods of Reid, supra*, at p. 76, *per* WILDE, J.

Succession to Movables.

Exercise of powers of appointment.

343. A power of appointment by will over movables given by an English settlement (*u*) or by the will of a person who dies domiciled in England (*a*) is, in point of form, validly executed by a will complying with the Wills Act, 1837 (*b*), and the requirements of the power (*c*), whatever the domicil of the appointor may be (*d*).

Where the will is not executed in accordance with the Wills Act, 1837 (*c*), such a power is nevertheless validly executed if the will complies with the law of the testator's domicil and with the requirements of the power (*e*), but in such a case the will must refer to the power (even if it is a general power (*f*)), wherever the law of the appointor's domicil requires that to be done (*g*).

A will of a British subject, which is not valid by the law of the testator's domicil but is rendered valid by reason of the Wills

(*u*) *I.e.*, a settlement intended to be governed by English law. See *Re Daly's Settlement* (1858), 25 Beav. 456; *Re Muspratt-Williams, Muspratt-Williams* v. *Howe*, [1901] W. N. 14; *Re Mégret, Tweedie* v. *Maunder*, [1901] 1 Ch. 547; *Re D'Este's Settlement Trusts, Poulter* v. *D'Este*, [1903] 1 Ch. 898. Compare *Re Fitzgerald, Surman* v. *Fitzgerald*, [1903] 1 Ch. 933; [1904] 1 Ch. 573, C. A.; see also p. 238, *post*.

(*a*) Similarly, a power of appointment given by the will of a domiciled Scotsman must be exercised in accordance with the requirements of Scots law (*Re Bald, Bald* v. *Bald* (1897), 66 L. J. (CH.) 524). The nationality of the appointor is immaterial (*ibid.*).

(*b*) 7 Will. 4 & 1 Vict. c. 26, ss. 9, 10.

(*c*) This must of course be read subject to s. 10 of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), which provides that a will executed in the manner required by the Act shall so far as respects execution and attestation be a valid exercise of the power.

(*d*) *D'Huart* v. *Harkness* (1865), 34 Beav. 324; *Re Kirwan's Trusts* (1883), 25 Ch. D. 373; *In the Goods of Huber*, [1896] P. 209; *Re Mégret, Tweedie* v. *Maunder*, [1901] 1 Ch. 547; *In the Goods of Vannini*, [1901] P. 330. In cases where the will is not valid by the law of the domicil probate will nevertheless be granted, but limited to the property appointed under the power (*In the Goods of Huber, supra; In the Goods of Tréfond*, [1899] P. 247). A contrary opinion by CRESSWELL, J., in *Crookenden* v. *Fuller* (1859), 29 L. J. (P. M. & A.) 1, was subsequently corrected by the same judge in *In the Goods of Alexander* (1860), 29 L. J. (P. M. & A.) 93, on the authority of *Tatnall* v. *Hankey* (1838), 2 Moo. P. C. C. 342. This latter opinion was followed in *In the Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; compare *In the Goods of Tréfond, supra; In the Goods of Vannini, supra*.

(*e*) *D'Huart* v. *Harkness, supra; Re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442. A will valid by the law of the appointor's domicil, but not satisfying the requirements of the power, is not a valid appointment (*Barretto* v. *Young*, [1900] 2 Ch. 339). An attempted appointment by a will invalid in point of form will not be aided by the court as an attempt to exercise the power by deed, once it is shown that the instrument is intended to be testamentary (*Re Daly's Settlement* (1858), 25 Beav. 456; *Re Kirwan's Trusts*, (1883), 25 Ch. D. 373). But see *Re Walker, MacColl* v. *Bruce*, [1908] 1 Ch. 560, where a codicil valid by the law of the testator's domicil, but not in accordance with the terms of the power, was aided in favour of sons of the testator, there being no necessity, as in *Re Kirwan's Trusts, supra*, to rely on the Wills Act, 1861 (24 & 25 Vict. c. 114). Where the power is to appoint "by will" simply, it is satisfied by an appointment by a will valid according to the law of the appointor's domicil, and the addition of the words "duly executed" or similar words makes no difference, since every will admitted to probate is "duly executed" (*D'Huart* v. *Harkness, supra*).

(*f*) *Re D'Este's Settlement Trusts, Poulter* v. *D'Este*, [1903] 1 Ch. 898.

(*g*) In other words, s. 27 of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), does not apply to wills of domiciled foreigners. That section gives a rule of construction, which is only applicable to documents as to which the English court is a court of construction (*Re D'Este's Settlement Trusts, Poulter* v. *D'Este, supra; Re*

Act, 1861 (*h*), if not in the form required by the Wills Act, 1837 (*i*), apparently is not a valid execution of the power (*j*).

No appointment under the power can be validly made by a will which does not satisfy the conditions of the power (*k*), and either the provisions of the Wills Act, 1837 (*l*), or the requirements of the *lex domicilii* of the testator (*m*).

If an appointment under the power is valid by English law (*n*), no restrictions placed by the law of the testator's domicil on the exercise of the power can have any effect (*o*).

The question whether the power has been validly exercised or not cannot be determined by evidence not admissible by English law, although such evidence would have been admitted by the law of the testator's domicil (*p*).

Where money standing in court has been appointed under a power, it cannot be paid out unless probate is obtained in England (*q*).

Scholefield, Scholefield v. *St. John*, [1905] 2 Ch. 408; compromised on appeal, [1907] 1 Ch. 664, C. A.; see this latter case explained, note (*p*), *infra*; compare *Re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442, and *In re Baker's Settlement Trusts, Hunt* v. *Baker*, [1908] W. N. 101.

(*h*) 24 & 25 Vict. c. 114. See title WILLS.

(*i*) 7 Will. 4 & 1 Vict. c. 26, ss. 9, 10. See title WILLS.

(*j*) See *Re Kirwan's Trusts* (1883), 25 Ch. D. 373; *Hummel* v. *Hummel*, [1898] 1 Ch. 642. But in the former case the terms of the power were not complied with, while in *Hummel* v. *Hummel* the testatrix appears not to have been a British subject (see Dicey, Conflict of Laws, 2nd ed., pp. 694, 695). This rule (if it exists) is strictly limited to wills which are valid *only* by reason of the Wills Act, 1861 (24 & 25 Vict. c. 114) (see *Re Price, Tomlin* v. *Latter*, *supra*, where some doubt appears to be thrown on the decision in *Re Kirwan's Trusts*, a doubt which will apply *à fortiori* to the decision in *Hummel* v. *Hummel*, *supra*; see also *Re Walker, MacColl* v. *Bruce*, [1908] 1 Ch. 560). Note, that *D'Huart* v. *Harkness* (1865), 34 Beav. 324, was not cited in *Re Kirwan's Trusts*. In *D'Huart* v. *Harknes*, *supra*, Lord ROMILLY says, at p. 328: "A power to appoint by will, simply, may be executed by any will which, according to the law of this country, is valid, though it does not follow the forms of the statute (*i.e.*, the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26)," a statement of the law which covers wills valid under the Wills Act, 1861 (24 & 25 Vict. c. 114). Dicey (*loc. cit.*) criticises *Re Kirwan's Trusts* and *Hummel* v. *Hummel*, correctly, it is submitted.

(*k*) See note (*c*), p. 228, *ante*.

(*l*) 7 Will. 4 & 1 Vict. c. 26, ss. 9, 10.

(*m*) *Re Daly's Settlement* (1858), 25 Beav. 456; *Re Kirwan's Trusts*, *supra*; *Hummel* v. *Hummel*, *supra*; *Barretto* v. *Young*, [1900] 2 Ch. 339; *Re D'Este's Settlement Trusts, Poulter* v. *D'Este*, [1903] 1 Ch. 898.

(*n*) *I.e.*, satisfies the requirements of English law as to the valid execution of the power (see above).

(*o*) *Pouey* v. *Hordern*, [1900] 1 Ch. 492; compare *Re Hernando, Hernando* v. *Sawtell* (1884), 27 Ch. D. 284. It makes no difference if the power is a general power, and therefore equivalent to absolute property (*Re Mégret, Tweedie* v. *Maunder*, [1901] 1 Ch. 547); compare *De Serre* v. *Clarke* (1874), L. R. 18 Eq. 587, where the appointee was held entitled to take under an appointment by a married woman domiciled in France, although by French law the property comprised in the power fell under the rule as to the community of goods.

(*p*) *Re Scholefield, Scholefield* v. *St. John*, [1905] 2 Ch. 408. In this case there were (1) a will valid by the *lex domicilii* (France) and satisfying the conditions of the power, but not referring to the property comprised in the power, and (2) certain documents clearly referring to the power which by French law were admissible as evidence of intention to deal with the property comprised in the power. It was held that French law could only be referred to on the question of the validity of the will (1), and that the documents referred to in (2) were merely evidence the admissibility of which was to be determined not by French, but by English law (*lex fori*). The case was compromised on appeal, [1907] 1 Ch. 664, C. A.

(*q*) *Re Vallance, Ex parte Limehouse Board of Works* (1883), 24 Ch. D. 177;

SECT. 2. SUB-SECT. 5.—*Construction of Wills of Movables.*

Succession to Movables.

Construction of wills.

Technical terms in wills.

344. As a general rule, wills of movables must be construed with reference to the law of the testator's domicil at the time of his death (*r*), although in the case of persons dying since the 6th of August, 1861, the construction is not altered by a change of domicil made after the execution of the will (*s*). But where an intention appears on the face of the will that it should be construed with reference to some other law, construction is governed by that law (*t*). Thus, where technical expressions peculiar to a foreign law are used, that law, and not the law of the domicil, determines questions of construction (*a*), but the presence of a few such technical expressions is not by itself a sufficient indication of intention to induce the court to construe the will with reference to the law to which such expressions belong (*b*); and where it is shown that no technical rules of construction are applied to words by the law of the domicil, no reference to that law is necessary, and the will must be construed according to English rules of construction (*c*).

Translations.

Where a translation of a will has been admitted to probate and the original (or, where that is abroad, a duly certified copy) has been deposited therewith, the court may refer to such original for the purpose of deciding questions of construction (*d*), but if objection is made, the translation may have first to be brought before the Probate Division for correction (*e*).

Debts and gifts.

345. In construing a will, debts are to be regarded as situated

compare *Re Tootal's Trusts* (1883), 23 Ch. D. 532, where, however, it was held that the court at Shanghai, which had granted probate, was a duly constituted British court of competent jurisdiction, and accordingly it was unnecessary to obtain further probate in England.

(*r*) *Nisbett* v. *Murray* (1799), 5 Ves. 149; *Yates* v. *Thomson* (1835), 3 Cl. & Fin. 544, H. L.; *Bernal* v. *Bernal* (1838), 3 My. & Cr. 559; *Guthrie* v. *Walrond* (1883), 22 Ch. D. 573; *Bradford* v. *Young* (1884), 26 Ch. D. 656; (1885) 29 Ch. D. 617, C. A.; *Re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442; *Re D'Este's Settlement Trusts, Poulter* v. *D'Este*, [1903] 1 Ch. 898; *Re Bowes, Bates* v. *Wengel* (1906), 22 T. L. R. 711. The courts of the domicil are of course primarily the courts to pronounce on this as on every other question. See p. 222, *ante*. Compare *Laneuville* v. *Anderson* (1860), 2 Sw. & Tr. 24; *Re Scholefield, Scholefield* v. *St. John*, [1905] 2 Ch. 408. This is not the same thing as adopting the rules of the *lex domicilii* as to evidence, which is a question for the *lex fori* (see *Yates* v. *Thomson*, *supra*; and compare *Re Scholefield, Scholefield* v. *St. John*, *supra*). As to evidence, see p. 307, *post*, note (*p*) on p. 229, *ante*, and title WILLS.

(*s*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3. This section is not confined to British subjects (*In the Estate of Groos*, [1904] P. 269).

(*t*) *Re Price, Tomlin* v. *Latter*, *supra*, where the testatrix declared that her will "annuls all the others . . . and that it shall thus be considered in England the same as in France."

(*a*) *Studd* v. *Cook* (1883), 8 App. Cas. 577; compare *Trotter* v. *Trotter* (1829), 4 Bli. (N. S.) 502, H. L.; *Re Cliff's Trusts*, [1892] 2 Ch. 229. *Anstruther* v. *Chalmer* (1826), 2 Sim. 1, depends not on the question of construction, but on that of material validity, for which see p. 226, *ante*. Note, the fact that the will is written in a foreign language is not, of itself, sufficient to cause it to be construed by the law of the country in whose language it is written (*Reynolds* v. *Kortright* (1854), 18 Beav. 417).

(*b*) *Bradford* v. *Young* (1884), 26 Ch. D. 656; (1885) 29 Ch. D. 617.

(*c*) *Bernal* v. *Bernal* (1838), 3 My. & Cr. 559.

(*d*) *Re Cliff's Trusts*, [1892] 2 Ch. 229, correcting the report in *L'Fit* v. *L'Batt* (1718), 1 P. Wms. 526. For the cases where probate of a translation is granted, see note (*k*), p. 225, *ante*.

(*e*) *Re Cliff's Trusts*, *supra*.

where the debtor is resident (*f*), but whether or not a gift in a will is to be construed as being in satisfaction of a previous obligation depends on the law of the testator's domicil, whatever the law governing the obligation may be (*g*).

Election.

An heir claiming under a will which is invalid to pass an immovable, but valid to pass movables, will be put to his election, wherever the law of the testator's domicil so provides (*h*), irrespective of the *lex loci rei sitæ* of the immovable (*i*).

Meaning of "children" and "nearest of kin."

"Children" in a will includes children who have been legitimated *per subsequens matrimonium* in a manner recognised by the law of the testator's domicil (*k*). Similarly, "nearest of kin" in the will of a domiciled Englishman means nearest of kin by English law (*l*).

Payment of legacies.

346. What currency a legacy is to be paid in is a question of intention. *Primâ facie*, the currency is that of the testator's domicil (*m*), but where a different currency is expressly indicated the legacy must be paid in such currency (*n*), and where the testator makes a separate distribution of property in different countries, charging legacies on each, such legacies must be paid respectively in the currency of the country in which the property on which they are charged is situated (*o*); but the mere fact that the testator owns properties situate in different countries does not, without such separate distribution, exclude the currency of the

(*f*) *Arnold* v. *Arnold* (1833), 2 My. & K. 365. A gift of all the testator's property in England passes debts due from persons resident in England (see *Tyrone* (*Earl*) v. *Waterford* (*Marquis*) (1860), 1 De G. F. & J. 613, 628, C. A.; *Guthrie* v. *Walrond* (1883), 22 Ch. D. 573; compare *Re Clark, McKechnie* v. *Clark*, [1904] 1 Ch. 294).

(*g*) *Campbell* v. *Campbell* (1866), L. R. 1 Eq. 383.

(*h*) Provided the *lex domicilii* recognises the principle of election in such a case, this becomes a mere question of construction. Most of the English cases deal with wills by domiciled Englishmen invalid to pass Scots real estate, and it appears from them that words referring specifically or by necessary implication to the real estate are required before the heir can be put to his election. For cases where the indication of intention has been held sufficient, see *Brodie* v. *Barry* (1813), 2 Ves. & B. 127; *Dundas* v. *Dundas* (1830), 2 Dow & Cl. 349, H. L.; *Orrell* v. *Orrell* (1871), 6 Ch. App. 302; and where insufficient, see *Trotter* v. *Trotter* (1829), 4 Bli. (N.S.) 502, H. L.; *Johnson* v. *Telford* (1830), 1 Russ. & M. 244; *Allen* v. *Anderson* (1846), 5 Hare, 163; *Maxwell* v. *Maxwell* (1852), 2 De G. M. & G. 705, C. A.; *Maxwell* v. *Hyslop* (1867), L. R. 4 Eq. 407; and compare *Dewar* v. *Maitland* (1866), L. R. 2 Eq. 834. There can, of course, be no election in case of an intestacy (*Balfour* v. *Scott* (1793), 6 Bro. Parl. Cas. 550).

(*i*) See *Balfour* v. *Scott*, *supra*.

(*k*) *Goodman* v. *Goodman* (1862), 3 Giff. 643; *Re Goodman's Trusts* (1881), 17 Ch. D. 266, C. A.; *Re Andros*, *Andros* v. *Andros* (1883), 24 Ch. D. 637; disapproving *Boyes* v. *Bedale* (1863), 1 Hem. & M. 798; *Re Grey* v. *Stamford*, [1892] 3 Ch. 88; and see note (*e*), p. 219, and note (*e*), p. 224, *ante*.

(*l*) *Re Fergusson's Will*, [1902] 1 Ch. 483. This leaves any question of status to be determined by the personal law of the claimant (see last note).

(*m*) *Saunders* v. *Drake* (1742), 2 Atk. 465. In *Holmes* v. *Holmes* (1830), 1 Russ. & M. 660, the currency of the testator's domicil had changed between the date of the will and the date of death, and it was held that the currency existing at the date of execution was intended. Some cases appear to make the place where the will was made the test (see *Malcolm* v. *Martin* (1790), 3 Bro. C. C. 50; *Pierson* v. *Garnet* (1786), 2 Bro. C. C. 38; and compare *Saunders* v. *Drake*, *supra*). But in these cases this seems to have been identical with the place of domicil. For legacies charged on immovables, see p. 212, *ante*.

(*n*) *Raymond* v. *Brodbelt* (1800), 5 Ves. 199 a.

(*o*) *Pierson* v. *Garnet*, *supra*; *Saunders* v. *Drake* (1742), 2 Atk. 465.

SECT. 2. Succession to Movables.

domicil (*p*). Where, however, some legacies are given in a currency different to that of the domicil, and in others no reference to currency is made, the latter are payable in the currency of the domicil (*q*).

In cases where the legacy is payable in the currency of a foreign country, its value must be computed according to the value of the currency in that country without any deduction for the cost of remittance (*r*); but where such a legacy is payable out of assets in England, its value must be computed according to the rate of exchange, and not according to the actual value in the foreign country itself (*s*).

Unless a contrary intention appears on the face of the will, a legacy in the currency of a foreign country carries interest at the local rate (*t*).

Part VII.—Contracts.

SECT. 1.—*Jurisdiction with regard to Contracts.*

Jurisdiction of English courts.

347. The English courts have (with very few exceptions) jurisdiction (*u*) to entertain an action relating to a contract, wherever made, in all cases where personal or (if necessary) substituted service of the writ has been effected on the defendant or defendants in England or when leave has been given to serve the writ or notice of the writ out of the jurisdiction or when the parties have voluntarily submitted to the jurisdiction (*w*). But in no circumstances can a foreign sovereign be sued in England against his will (*x*), although he may appear as plaintiff (*y*); and by statute

Foreign sovereign etc.

(*p*) *Saunders* v. *Drake* (1742), 2 Atk. 425.

(*q*) *Malcolm* v. *Martin* (1790), 3 Bro. C. C. 50; *Saunders* v. *Drake*, *supra*.

(*r*) *Cockerell* v. *Barber* (1810), 16 Ves. 461.

(*s*) *Campbell* v. *Graham* (1831), 1 Russ. & M. 453; on appeal, *sub nom.* *Campbell* v. *Sandford* (1834), 2 Cl. & Fin. 429, 450, H. L.

(*t*) *Saunders* v. *Drake*, *supra*; *Raymond* v. *Brodbelt* (1800), 5 Ves. 199 a; but see *Malcolm* v. *Martin*, *supra*, where English interest was given. The true rule is perhaps that interest must be given according to the rate of the country in which the fund is situated (see *Malcolm* v. *Martin*, *supra*, at p. 54, n.; and compare *Raymond* v. *Brodbelt*, *supra*, which appears to have been decided on this principle). See also *Bourke* v. *Ricketts* (1804), 10 Ves. 330, where there were two funds, and legatees preferring to take payment out of the English fund were held to be entitled only to English interest.

(*u*) The rules relating to the jurisdiction with regard to contracts are generally the same as for all other actions *in personam*, and will be found fully discussed under title PRACTICE AND PROCEDURE, and other titles. The old rules relating to venue are modified by R. S. C., Ord. 36, r. 1. See title ACTION, Vol. I., p. 1.

(*w*) R. S. C., Ord. 1, r. 1; Ord. 9, r. 2; and see Ord. 48A for rules relating to service on partners. The defendant's nationality is immaterial. See title PRACTICE AND PROCEDURE for a discussion of the rules and the numerous cases decided thereunder. See *Tharsis Sulphur and Copper Co.* v. *Société des Métaux* (1889), 58 L. J. (Q. B.) 435; *The Gemma*, [1899] P. 285, C. A. *Zycklinski* v. *Zycklinski* (1862), 2 Sw. & Tr. 420, illustrates the same principle, but is no longer good law so far as jurisdiction to decree a divorce is concerned (see *Armitage* v. *A.-G.* (*Gillig* cited), *Gillig* v. *Gillig*, [1906] P. 135, *per* GORELL BARNES, P., at p. 140).

(*x*) Compare *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149, C. A.; but he may submit to the jurisdiction (*ibid.*, at p. 159). See title ACTION, vol. I., p. 18.

(*y*) See *per* MAULE, J., in *Taylor* v. *Best* (1854), 23 L. J. (C. P.) 89, at p. 93;

SECT. 1. Jurisdiction with regard to Contracts.

foreign ambassadors and ministers (including secretaries and attachés) (*z*) and their servants) enjoy a similar privilege, provided that no merchant or trader can secure the benefits of the Act by taking service under an ambassador or minister (*a*). The statute has no application to consuls (*b*).

When jurisdiction disclaimed.

In certain circumstances the English courts disclaim jurisdiction to entertain an action on a contract relating to foreign immovables (*c*), and they will not entertain an action to recover taxes or rates imposed by a foreign law, even though that foreign law enacts that they may be recovered by action as a debt (*d*).

SECT. 2.—*Capacity to Contract.*

General rule.

348. The general rule of English law would appear to be that capacity to contract, being a question of status, is governed by the *lex domicilii* of the contracting party (*e*). The preponderance of authority supports this view, but the question is not wholly without doubt (*f*). An exception to the general rule clearly exists in the case of contracts relating to immovables, where capacity is governed solely by the *lex situs* (*g*). But it is probable also that

Hullet & Co. v. *King of Spain* (1828), 1 Dow & Cl. 169, H. L. Compare *South African Republic* v. *Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487, C. A.

(*z*) *Parkinson* v. *Potter* (1885), 16 Q. B. D. 152.

(*a*) Diplomatic Privileges Act, 1708 (7 Ann. c. 12), ss. 3 and 5 ; and see titles ACTION, Vol. I., p. 19 ; CONSTITUTIONAL LAW, *post*.

(*b*) *Barbuit's Case* (1737), Cas. *temp.* Talb. 281 ; *Viveash* v. *Becker* (1814), 3 M. & S. 284.

(*c*) For the cases in which the court disclaims jurisdiction see pp. 199 *et seq.*, *ante*.

(*d*) *Sydney Municipal Council* v. *Bull*, [1909] 1 K. B. 7.

(*e*) *Cooper* v. *Cooper* (1888), 13 App. Cas. 88 :—"The capacity to contract is regulated by the law of the domicil," *per* Lord HALSBURY, at p. 99 ; *Guépratte* v. *Young* (1851), 4 De G. & Sm. 217 ; *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441 :—"The civil status is governed universally by one single principle, namely, that of domicile. . . . It is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend," *per* Lord WESTBURY, at p. 457 ; *Sottomayor* v. *De Barros* (1877), 3 P. D. 1, C. A. :—"It is a well recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile," *per* COTTON, L.J., at p. 5 ; *Re Cooke's Trusts* (1887), 56 L. J. (CH.) 637, *per* STIRLING, J., following *Sottomayor* v. *De Barros*, *supra* ; *Abd-Ul-Messih* v. *Farra* (1888), 13 App. Cas. 431. Compare *Stephens* v. *M'Farland* (1845), 8 I. Eq. R. 444 ; Dicey, Conflict of Laws, 2nd ed., pp. 534 *et seq.* ; Westlake, Private International Law, 4th ed., pp. 41 *et seq.* ; Foote, Private International Jurisprudence, 3rd ed., pp. 358 *et seq.* The last two writers do not, however, appear prepared to give unqualified support to the *lex domicilii*. As to capacity to contract see title CONTRACT.

(*f*) See *per* Lord MACNAGHTEN in *Cooper* v. *Cooper*, *supra*, at p. 108: "Perhaps in this country the question is not finally settled, although the preponderance of opinion, here as well as abroad, seems to be in favour of the law of the domicile, it may be that all cases are not to be governed by one and the same rule." Lord WATSON, in the same case, speaks of the question as "a fertile subject of controversy" (p. 105), but one unnecessary to decide in the case before him, the *lex domicilii* and the *lex loci contractus* not being in conflict. And compare *Male* v. *Roberts* (1800), 3 Esp. 163 (Lord Eldon) ; *Simonin* (falsely called *Mallac*) v. *Mallac* (1860), 2 Sw. & Tr. 67 :—"In general the personal competency or incompetency of individuals to contract has been held to depend on the law of the place where the contract was made," *per* CRESSWELL, J., at p. 77 ; *Ogden* v. *Ogden*, [1908] P. 46, C. A., at p. 59.

(*g*) See Dicey, Conflict of Laws, 2nd ed. p. 501, citing Story, Conflict of

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capacity to enter into an ordinary mercantile contract (as distinguished, for example, from a contract of marriage or a marriage settlement) may be governed not by the *lex domicilii* of the contracting party, but by the *lex loci contractus* (*h*).

Marriage contracts.

349. Capacity to enter into the contract of marriage is governed by the *lex domicilii* of the parties (*i*), but involves special considerations (*k*). Capacity to enter into a marriage settlement or into any contract having reference to the assignment of property on marriage is governed by the *lex domicilii* (*l*); so, also, a married woman domiciled abroad may dispose of property if the law of the domicil, permits her to do so, though she may be incapable of making the disposition by English law (*m*).

Female infants.

A female infant domiciled in England cannot enter into an irrevocable marriage settlement, that is to say, one which she cannot at a subsequent date repudiate, even though after her marriage she acquires a domicil in a country where the settlement would be otherwise binding (*n*); but she may, by acquiring a new domicil, lose the right to ratify the contract within a reasonable time after attaining her majority, with the result that she may repudiate the contract after the time during which by English law she would be permitted to do so (*o*).

Infant bankrupt.

Where an infant by the law of his domicil can trade and become bankrupt, the legal effect of his bankruptcy will (it is assumed) be recognised in England (*p*).

Laws, ss. 430, 431; Westlake, Private International Law, 4th ed., p. 203. See also p. 207, *ante*.

(*h*) *Male* v. *Roberts* (1800), 3 Esp. 163, *Simonin* (falsely called *Mallac*) v. *Mallac*, (1860), 2 Sw. & Tr. 67, *per* CRESSWELL, J.; and see especially remarks of GORELL BARNES, P., in *Ogden* v. *Ogden*, [1908] P. 46, C. A., at p. 59, on the words of COTTON, L.J., in *Sottomayor* v. *De Barros* (1877), 3 P. D. 1, C. A., at p. 5, cited note (*e*), on p. 233, *ante*. Sir GORELL BARNES refers in particular to Story, Conflict of Laws, ss. 75, 76, on the inconvenience of applying the *lex domicilii* to capacity to contract, and to the judgment of PORTER, J., in *Saul* v. *His Creditors* (1827), 5 Martin (N. S.) (La.), 569, at pp. 596—598. See also Dicey, Conflict of Laws, 2nd ed., pp. 538—540; Foote, Private International Jurisprudence, 3rd ed., pp. 71 *et seq.* and pp. 359 *et seq.*; Westlake, Private International Law, 4th ed., p. 44.

(*i*) *Sottomayor* v. *De Barros*, *supra*; *Brook* v. *Brook* (1861), 9 H. L. Cas. 193; *Ogden* v. *Ogden*, [1908] P. 46, C. A.; unless there are cases of the legality or illegality of a particular marriage not really involving a question of *capacity* at all. See p. 254, *post*.

(*k*) These are discussed pp. 254 *et seq.*, *post*; and see especially *Chetti* v. *Chetti* (1908), 25 T. L. R. 146, and title HUSBAND AND WIFE.

(*l*) *Re Cooke's Trusts* (1887), 56 L. J. (CH.) 637; *Cooper* v. *Cooper* (1888), 13 App. Cas. 88. Compare *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87, C. A.

(*m*) *Guépratte* v. *Young* (1851), 4 De G. & Sm. 217. Perhaps, however, this case is not strictly concerned with capacity at all, but rather of rights conferred by a marriage contract (see Foote, Private International Jurisprudence, 3rd ed., p. 78).

(*n*) *Re Cooke's Trusts*, *supra*; *Cooper* v. *Cooper*, *supra*. Except, of course, in cases under the Infants Settlements Act, 1855 (18 & 19 Vict. c. 43).

(*o*) *Viditz* v. *O'Hagan*, *supra*. By the change of domicil the infant in that case lost the opportunity of making her settlement binding and irrevocable. The condition imposed by English law that affirmation or repudiation must take place within a reasonable time after majority "is a mere incident of *status* and has no application when the status is changed," *per* COLLINS, L.J., at p. 100. See also title INFANTS AND CHILDREN.

(*p*) See *Stephens* v. *M'Farland* (1845), 8 I. Eq. R. 444 (a question of the title of the assignee of an infant bankrupt abroad). The *lex domicilii* is clearly recognised as decisive of the status of bankruptcy.

Married women.

350. An assignment by a husband to a wife which is invalid by the law of his domicil by reason of the wife's coverture, is (possibly) invalid in England (*q*). But where a legacy is given in trust by a testator domiciled in England to a married woman domiciled abroad without power of anticipation, the English court cannot sanction an arrangement, however beneficial to the legatee, which will involve an anticipation of the income of the legacy, even though by the law of her domicil no restraint on anticipation is recognised (*r*).

Legacies.

351. A legacy bequeathed by a testator domiciled in England may be paid to a legatee on his own receipt if he is of full age by the law of his domicil, though still an infant by English law (*s*), and if he is under age according to both laws, it will be paid to him when he comes of age according to either law, whichever happens first (*t*).

Letters of administration.

352. The English courts will not (it seems) follow the grant of letters of administration made by the courts of the country of the domicil in cases where to do so would be to act in contradiction to English law (*a*). Thus, a grant will not be made to an infant domiciled abroad, though competent by the law of his domicil, since his infancy would prevent him from exercising in England the authority given him (*b*).

Statutory incapacity.

353. An English statute may impose on any British subject an incapacity to enter into certain contracts, and this incapacity will

(*q*) *Lee* v. *Abdy* (1886), 17 Q. B. D. 307. The *lex domicilii* and the *lex loci contractus* were, however, the same (as in *Cooper* v. *Cooper* (1888), 13 App. Cas. 88), and it is therefore uncertain how far this case may be regarded as an authority for the *lex domicilii* in the matter of the wife's incapacity. The decision is also justified on the ground that the validity of an assignment of policies of insurance (which were the subject-matter of the assignment in the case in question) depends on the law of the place where the assignment is made; see p. 217, *ante*.

(*r*) *Peillon* v. *Brooking* (1858), 25 Beav. 218. Had the sanction been given, it would have meant that a trust of personalty declared by an English will in favour of a person domiciled in a foreign country was to be governed not by the English, but by the foreign law; the capacity of the beneficiary to enter into the arrangement was not denied, but the foreign law could not be permitted to override the provisions of an English trust under the control of the English court. The case is not therefore an authority against the law of the domicil. But this decision also may be regarded perhaps as one affecting the validity of an assignment; see p. 217, *ante*. Compare also *Kelly* v. *Selwyn*, [1905] 2 Ch. 117.

(*s*) *Re Hellmann's Will* (1866), L. R. 2 Eq. 363.

(*t*) *Re Hellman's Will*, *supra*. Neither law is thus held to be exclusive.

(*a*) See *Re D'Orléans* (*Duchess*) (1859), 1 Sw. & Tr. 253.

(*b*) *Ibid.* Compare *In the Goods of Meatyard*, [1903] P. 127. These cases are illustrations of the general law governing capacity rather than of contractual capacity in particular; but they cannot be quoted as authorities against the law of the domicil, any more than *Peillon* v. *Brooking*, *supra*. The foreign administrator cannot claim an English grant as of right, and the English courts in the cases cited refused to make the grant, not from any preference for English law over the law of the domicil, but because by the general English law, the grant would in effect have been useless (Dicey, Conflict of Laws, 2nd ed., pp. 445—447). But where a grant is of a very limited nature it will sometimes be made even to a minor domiciled abroad (*Re Da Cunha* (*Countess*) (1828), 1 Hag. Ecc. 237, grant limited to receipt of dividends to which minor was entitled).

SECT. 2. **Capacity to Contract.**

be recognised by the English courts, apart from all considerations of the domicil of the contracting party and of the place where the contract was attempted to be made (*c*).

Foreign disability.

354. Disabilities imposed by the *lex domicilii* and resulting from a status of a kind not recognised by English law will have no effect on the capacity to contract in England (*d*).

SECT. 3.—*Formalities of Contracts.*

Form governed by *lex loci contractus.*

355. As a rule the form (as distinguished from the essentials) of a contract is governed by the *lex loci contractus* (*e*), and a contract which does not comply with the requirements of that law in the matter of form is invalid in England (*f*). Thus, the formalities required to constitute a valid marriage are exclusively governed by the *lex loci contractus*, whatever the domicil of the parties (*g*).

Want of stamp.

A contract in writing entered into abroad and void by the *lex loci contractus* for want of a stamp is a nullity in England (*h*), and the document in which it is contained is not receivable as evidence of the contract in England (*i*); but where a document is merely inadmissible as evidence by the *lex loci* for want of a stamp and is not void, it may be received as evidence in England (*k*).

(*c*) The Royal Marriage Act, 1772 (12 Geo. 3, c. 11), is an example. The incapacity to marry except as provided by the Act is a personal incapacity which follows the descendants of George III. wherever they may be, and invalidates (in England at any rate) all their marriages wherever contracted (*The Sussex Peerage* (1844), 11 Cl. & Fin. 85, H. L.). And see title CONSTITUTIONAL LAW, *post.*

(*d*) This is a branch of the general rule that the courts of no country recognise the penal laws of another, nor a status inconsistent with the policy of its own laws: *Huntington* v. *Attrill*, [1893] A. C. 150, P. C. (penal law); *Worms* v. *De Valdor* (1880), 49 L. J. (CH.) 261; *Re Selot's Trusts*, [1902] 1 Ch. 488 (French "prodigue"). Religious and racial disability, monastic vows or slavery, would be other examples (*Sommersett's Case* (1772), 20 State Tr. 1; *Forbes* v. *Cochrane* (1824), 2 B. & C. 448; *Chetti* v. *Chetti* (1908), 25 T. L. R. 146; Dicey, Conflict of Laws, 2nd ed., pp. 459 *et seq.*). But the effects of a status imposed by the *lex domicilii*, but unknown to and contrary to the policy of English law, will be recognised in England so far as concerns acts done and rights acquired in the country of the domicil itself (see Dicey, Conflict of Laws, 2nd ed., pp. 461—463). *Quære*, whether a contract made in the country of the domicil, and wholly void by reason of a penal disability of the party contracting, would be good in England (see Dicey, Conflict of Laws, 2nd ed., pp. 551, 552.) Apparently it would not.

(*e*) *Compton* v. *Bearcroft* (1769), 2 Hag. Con. 430, n.; *Dalrymple* v. *Dalrymple* (1811), 2 Hag. Con. 54; *Kent* v. *Burgess* (1840), 11 Sim. 361; *Guépratte* v *Young* (1851), 4 De G. & Sm. 217; *Leroux* v. *Brown* (1852), 12 C. B. 801, at p. 824. Compare *Benham* v. *Mornington* (*Earl*) (1846), 3 C. B. 133; *Brinkley* v. *A.-G.* (1890), 15 P. D. 76; *Ogden* v. *Ogden*, [1908] P. 46, C. A. Where an offer made in one country is accepted in another, the contract is regarded as being made in the country from which the acceptance is sent: *Cowan* v. *O'Connor* (1888), 20 Q. B. D. 640; compare *Henthorn* v. *Fraser*, [1892] 2 Ch. 27, C. A.

(*f*) As in *Kent* v. *Burgess*, *supra.*

(*g*) *Compton* v. *Bearcroft*, *supra*; *Dalrymple* v. *Dalrymple*, *supra*; *Kent* v. *Burgess*, *supra*; *Ogden* v. *Ogden*, *supra.* See p. 256, *post*, where the subject of the formalities of marriage is fully discussed.

(*h*) *Alves* v. *Hodgson* (1797), 7 Term Rep. 241 (promissory note).

(*i*) *Ibid.*

(*k*) *Bristowe* v. *Sequeville* (1850), 5 Exch. 275 (receipt); see also *Clegg* v. *Levy* (1812), 3 Camp. 166.

But a contract made abroad which conforms in every way to the *lex loci contractus* both as to form and otherwise may nevertheless not be enforceable in England, if the English rules of procedure require it to be proved in some particular way. For instance, mere matters of evidence and proof, such as the observance of the requirements of the Statute of Frauds, are regulated by the *lex fori* (*l*).

Mode of proof.

An exception to the general rule is to be found in the case of a contract relating to immovables, the formalities of which are governed by the *lex situs* (*m*). Where, also, an Act of Parliament intended to take effect outside England (so far at least as British subjects are concerned) prescribes or permits certain formalities in connection with contracts made abroad, the English courts are bound to recognise the validity of such contracts, even though they do not comply with the forms of the *lex loci contractus* (*n*). There is also authority for a further exception to the general rule—namely, that where a contract made in one country is intended to be performed wholly in, and to be governed by the law of, another, it will be valid in England though its formalities may not comply with the *lex loci contractus*, if they satisfy the requirements of the law by which the parties intended that their contract should be governed (*o*). So, a marriage settlement dealing with property situate in England, and intended by the parties to be governed solely by English law, may perhaps be valid in England, though void by the *lex loci contractus* because not in the form prescribed by that law (*p*).

Exceptions to general rule.

(*l*) See *Leroux* v. *Brown* (1852), 12 C. B. 801 (valid French contract unenforceable in England owing to absence of note or memorandum required by Statute of Frauds). See p. 307, *post*.

(*m*) *Waterhouse* v. *Stansfield* (1852), 10 Hare, 254; *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403. On this point see, however, Dicey, Conflict of Laws, 2nd ed., pp. 502, 503. Mr. Dicey also raises a question as to the form of contracts made in one country relating to movables situate in another (Dicey, Conflict of Laws, 2nd ed., pp. 543, 544).

(*n*) Compare the Foreign Marriage Act, 1891 (54 & 55 Vict. c. 74), which enables a marriage which will be recognized as valid in England to be celebrated in any part of the world, provided one of the contracting parties is a British subject and the provisions of the Act are complied with. But the courts of a foreign country are not bound to recognize such a marriage as valid outside the British Isles (*Hay* v. *Northcote*, [1900] 2 Ch. 262. See p. 258, *post*; compare also the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72.

(*o*) *Van Grutten* v. *Digby* (1862), 31 Beav. 561, *per* ROMILLY, M.R., at p. 567. *Re Marseilles Extension Railway and Land Co., Smallpage's* and *Brandon's Cases* (1885), 30 Ch. D. 598, decided that the drawer of a bill who had indorsed it in France to an indorsee in England in a form invalid by French law was nevertheless liable in England; whether the acceptor would also have been liable was left open. Apart altogether from other considerations, this case may perhaps be regarded as one of estoppel (see *per* ROMER, L.J., in *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677, C. A., at p. 682; see also the judgment of VAUGHAN WILLIAMS, L.J., at p. 684). In *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333, a marriage settlement made in Italy and void by Italian law both in form and substance was held good in England, the settlement being in English form, dealing with English funds and clearly intended to be governed by English law. The question as to the form of the settlement does not, however, appear to have been raised or argued and is not discussed in the judgment. Mr. Dicey (Conflict of Laws, 2nd ed., pp. 543, 544) regards this rule as reasonable, though wanting in authority; he does not, however, refer to the last-mentioned case.

(*p*) *Re Bankes, Reynolds* v. *Ellis*, *supra*.

SECT. 4. Law Governing Contracts.

SECT. 4.—*Law Governing Contracts.*

Proper law of the contract.

356. The essential validity of a contract (as distinguished from its formal validity (*q*)) as well as its interpretation and effect (*r*), and the rights and obligations of the parties to it (*s*), are governed (with certain exceptions) by the law which the parties have agreed (*t*) or intended shall govern it, or which they may be presumed to have intended (*a*). This law is generally known as the proper law of the contract (*b*).

Examples of application.

Thus, a bill of lading for goods shipped between England and America containing an exception against negligence which is void by American but good by English law will be governed by the proper law of the contract as defined above (*c*); so also will the validity of a contract made in England, but to be performed in another country where it is void as being in restraint of trade (*d*); or of a submission, contained in a contract signed in England but to be performed in Scotland, which is made void by Scottish law because to an unnamed arbitrator (*e*); or of a promise made in Denmark to marry in England (*f*).

In the same manner the proper law of the contract governs the construction of a marriage settlement executed out of England (*g*), as well as the execution of the trusts declared in such a settlement or any other instrument (*h*); the rights and obligations arising from a valid submission to arbitration entered into abroad (*i*); the liabilities in respect of sea-damage and its incidents under a contract of affreightment from a foreign port (*k*); the liability of carriers

(*q*) *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, C. A.; *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202; *South African Breweries* v. *King*, [1899] 2 Ch. 173; [1900] 1 Ch. 273, C. A.

(*r*) See *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.; *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A.

(*s*) See *Peninsular and Oriental Steamship Co.* v. *Shand* (1865), 3 Moo. P. C. C. (N. S.) 272; *Chamberlain* v. *Napier* (1880), 15 Ch. D. 614; *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q. B. D. 589, C. A.; *Re Missouri Steamship Co., supra; Chatenay* v. *Brazilian Submarine Telegraph Co., supra; Spurrier* v. *La Cloche*, [1902] A. C. 446.

(*t*) See *The Nina* (1867), L. R. 2 A. & E. 44; *Greer* v. *Poole* (1880), 5 Q. B. D. 272; *The Mary Thomas*, [1894] P. 108, C. A.

(*a*) See the cases cited above and those cited below, which all illustrate the general principle.

(*b*) See Dicey, Conflict of Laws, 2nd ed., pp. 529, 530.

(*c*) *Re Missouri Steamship Co., supra* (bill of lading in the English form, made in America, for goods shipped from America to England in an English ship held governed by English law). And see titles CARRIERS, Vol. IV., p. 1; SHIPPING AND NAVIGATION.

(*d*) *South African Breweries* v. *King, supra* (contract held governed by foreign law though made in England and in English form).

(*e*) *Hamlyn* v. *Talisker Distillery, supra* (contract held governed by English law as best effectuating intention of parties).

(*f*) *Hansen* v. *Dixon* (1906), 96 L. T. 32. In this case it appeared that though the *lex loci contractus* recognised the existence of a contract, it gave no remedy for the breach of it.

(*g*) *Guépratte* v. *Young* (1851), 4 De G. & Sm. 217; *Chamberlain* v. *Napier, supra; Re Barnard, Barnard* v. *White* (1887), 56 L. T. 9.

(*h*) *Chamberlain* v. *Napier, supra.*

(*i*) *Spurrier* v. *La Cloche, supra.*

(*k*) See *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, Ex. Ch.

under a through contract of carriage (*l*); and the construction of a foreign power of attorney (*m*).

But an Act of Parliament or the rules of English law may always invalidate in England a contract which would otherwise be valid by its proper law (*n*).

Law chosen by parties.

357. No difficulty arises when the parties themselves expressly stipulate that their contract shall be governed by a particular law (*o*). But where the parties have made no such stipulation, it becomes necessary for the English courts to ascertain, from a consideration of the contract as a whole, what the intention of the parties in fact was, or what it may be presumed to have been (*p*).

Presumptions when no express stipulation.

There are, in the first place, certain presumptions which enable the courts, but only in the absence of other circumstances, to arrive at a conclusion on this difficult question. *Primâ facie*, the proper law of a contract is presumed to be the *lex loci contractus* (*q*), but the cases in which there is an entire absence of any other indication of what the intention of the parties may have been are not common, and it is impossible to lay down any single and definite rule (*r*).

(*l*) *Peninsular and Oriental Steamship Co.* v. *Shand* (1865), 3 Moo. P. C. C. (N. S.) 272.

(*m*) *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.

(*n*) As, for instance, the Royal Marriage Act, 1772 (12 Geo. 3, c. 11); *The Sussex Peerage* (1844), 11 Cl. & Fin. 85 H. L.; see p. 244, *post*, for a discussion of the cases where a contract good by its proper law is invalid in England because contrary to English law or policy.

(*o*) *The Nina* (1867), L. R. 2 A. & E. 44 (agreement signed by British mate of Portuguese vessel to be bound by commercial law of Portugal during period of service); *The Mary Thomas*, [1894] P. 108, C. A. (English policy of insurance with stipulation "general average payable as per foreign statement"). Compare *Guépratte* v. *Young* (1851), 4 De G. & Sm, 217.

(*p*) *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, Ex. Ch.: "It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter," *per* WILLES, J., at pp. 120, 121; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521, C. A.: "The question is . . . of the intention of the parties, and one must look at all the circumstances and gather from them what was the intention of the parties," *per* BRETT, L.J., at p. 529. Compare *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202; *South African Breweries* v. *King*, [1899] 2 Ch. 173; [1900] 1 Ch. 273, C. A. Mr. Westlake (Private International Law, 4th ed., pp. 280, 281) prefers a definition in which the intention of the parties does not play so prominent a part, and his views remain unshaken by the recent decisions cited above. The whole question is exhaustively discussed by Dicey, Conflict of Laws, 2nd ed., Appendix, Note 18, pp. 814—821, who prefers to say that the essential validity is governed "indirectly" by the proper law of the contract.

(*q*) *Arnott* v. *Redfern* (1825), 2 C. & P. 88; *Scott* v. *Pilkington* (1862), 2 B. & S. 11; *Peninsular and Oriental Steamship Co.* v. *Shand* (1865), 3 Moo. P. C. C. (N. S.) 272: "The general rule is that the law of the country where a contract is made governs as to the nature of the obligation and the interpretation of it," *per* TURNER, L.J., at p. 290); *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, Ex. Ch.: "It is generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended or ought to be presumed to have adopted," *per* WILLES, J., at p. 122; *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q. B. D. 589, C. A.; *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, C. A.; *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, C. A.; *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.

(*r*) See *per* BRETT, M.R., in *Jacobs* v. *Crédit Lyonnais*, *supra*, at p. 601:

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Matters to be considered.

The following matters must be considered. A contract made in one country but wholly to be performed in another may, in the absence of other circumstances, be regarded as intended by the parties to be governed by the *lex loci solutionis* (*s*). Thus, a marriage settlement executed in Scotland but declaring trusts of English realty was held to be governed by English law (*t*); and so also was a contract to marry made in Denmark, where the married home was intended to be in England (*a*). And, in particular, a bill or cheque drawn abroad and payable in England is governed, so far as its essential validity is concerned, by the law of England (*b*).

Place of performance.

What law most effective.

It is also very material to consider if the contract or any stipulations contained in it are void or invalid under one system of law though good under another, for it will be generally presumed that the parties contracted with reference to that law which would best effect the purpose of the agreement (*c*); though a partial invalidity of the contract under one of the laws which is possibly applicable is not conclusive (*d*). In certain circumstances, the law of the place with which the contract has the most real connection will be regarded as the law governing the contract (*e*).

Nationality.

The nationality of the parties has little or no bearing on the question of their intention (*f*), and not much weight is to be attached to residence under any particular system of law (*g*).

"There can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal." Compare the language of KEKEWICH, J., in *South African Breweries* v. *King*, [1899] 2 Ch. 173, at p. 179, where he speaks of "sound ideas of business, convenience and sense."

(*s*) See *per* Lord ESHER, M.R., in *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A., at pp. 82, 83 (power of attorney). Compare *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, C. A. But see *per* Lord HERSCHELL in *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202, at pp. 207, 208: "No doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance . . . but neither of them is in itself conclusive."

(*t*) *Chamberlain* v. *Napier* (1880), 15 Ch. D. 614. Here, however, the part of the settlement dealing with the English property was in English form, and English law was clearly intended to apply.

(*a*) *Hansen* v. *Dixon* (1906), 96 L. T. 32. Compare also *Norden Steam Co.* v. *Dempsey* (1876), 1 C. P. D. 654.

(*b*) *Robinson* v. *Bland* (1760), 2 Burr. 1077; *Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A.

(*c*) *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, C. A.: "The law which would make the contract valid in all particulars is the law to regulate the conduct of the parties," *per* FRY, L.J., at p. 341. Compare *Peninsular and Oriental Steamship Co.* v. *Shand* (1865), 3 Moo. P. C. C. (N. S.) 272; *Hamlyn* v. *Talisker Distillery*, *supra*, *per* Lord ASHBOURNE, at p. 215; *South African Breweries* v. *King*, *supra*.

(*d*) *South African Breweries* v. *King*, *supra*, *per* KEKEWICH, J., at p. 181.

(*e*) *Per* KEKEWICH, J., in *South African Breweries* v. *King*, *supra*, adopting the phraseology of Mr. Westlake (Private International Law, 4th ed., p. 280). This was the case of a contract of service made in England but to be performed in South Africa, and it was held that South African law must be applied. Compare *Chamberlain* v. *Napier*, *supra* (settlement made in Scotland declaring trusts of English realty: held, governed by English law).

(*f*) *Re Missouri Steamship Co.*, *supra*, at p. 329.

(*g*) *South African Breweries* v. *King*, *supra*. Except, perhaps, in the case of purely mercantile contracts: see *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521, C. A.; *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q. B. D. 589, C. A.

Form and language.

The form of the contract (*h*) and the fact that it contains phrases peculiar to one system of law (*i*), as well as the language in which it is expressed (*k*), are relevant, though the last is certainly not conclusive (*l*); but a stipulation that the parties agree to be bound in all things by the jurisdiction and decision of the courts of a particular country will be practically decisive (*m*).

Particular contracts.

Marriage settlements.

Insurance policy.

Affreightment.

358. Certain presumptions arise in the case of particular classes of contracts. A marriage settlement is presumed to have been intended by the parties to be governed by the law of the matrimonial domicil, in the absence of circumstances indicating a contrary intention (*n*). An English policy of insurance is governed by English law, unless the underwriter stipulates to the contrary (*o*), and the nationality of the ship and goods insured is immaterial (*p*). A contract of affreightment, where the parties have not otherwise expressly provided, will be governed by the law of the ship's flag (*q*) unless it is clear that it was intended to adopt some other law (*r*). The owner of cargo, in the absence of stipulation to the contrary, ships it to be dealt with by the law of the ship's flag. Thus, the validity of a bottomry bond given by the master of a ship is governed by the law of the flag (*s*). A general average adjustment is governed by the law of the place where the voyage properly and actually terminates (*t*). A through contract of carriage is governed by the *lex loci contractus*, in the absence of

Bottomry.

General average.

Through carriage.

(*h*) *Chamberlain* v. *Napier* (1880), 15 Ch. D. 614 (marriage settlement in Scotch form); *Re Barnard, Barnard* v. *White* (1887), 56 L. T. 9 (same); *The Leon XIII.* (1883), 8 P. D. 121, C. A. (Spanish articles entered into by British sailor); *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521, C. A. (English bill of lading); *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, C. A. (same).

(*i*) *The Leon XIII., supra; The Industrie*, [1894] P. 58, C. A. ("Queen's enemies" in charterparty).

(*k*) *The Leon XIII., supra; The Industrie, supra; Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.

(*l*) *The Industrie, supra.*

(*m*) *Royal Exchange Assurance Co.* v. *Sjoforsakrings Aktiebolaget Vega*, [1902] 2 K. B. 384, C. A., at p. 394. And see *Kirchner* v. *Gruban* (1908), 127 L. T. Jo. 166.

(*n*) See *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A., at p. 587; and p. 277, *post.*

(*o*) *Greer* v. *Poole* (1880), 5 Q. B. D. 272. Compare *Spurrier* v. *La Cloche, supra.*

(*p*) *Greer* v. *Poole, supra.*

(*q*) *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, Ex. Ch. In this remarkable case the plaintiff was a British subject who had chartered a French ship at a Danish West India port for a voyage from Hayti to Havre, London, or Liverpool, at charterer's option, and it was held that French law must be applied because no circumstances could be shown which indicated any intention to adopt any of the other possible laws. See also *The August*, [1891] P. 328. See also title SHIPPING AND NAVIGATION.

(*r*) See *The Patria* (1871), L. R. 3 A. & E. 436; *The San Roman* (1872), L. R. 3 A. & E. 583; *The Industrie, supra.*

(*s*) *Droege* v. *Suart, The "Karnak"* (1869), L. R. 2 P. C. 505; *The Gaetano and Maria* (1882), 7 P. D. 1, 137, C. A. The reason is to be found in the right of the master, outside the contract of affreightment altogether, to deal with the cargo at a port of distress. Compare *The Industrie, supra; The Stettin* (1889), 14 P. D. 142. See titles INSURANCE; SHIPPING AND NAVIGATION.

(*t*) *Hill* v. *Wilson* (1879), 4 C. P. D. 329; *Atwood* v. *Sellar* (1880), 5 Q. B. D. 286, at p. 289, C. A. Compare *Harris* v. *Scaramanga* (1872), L. R. 7 C. P. 481; *The Mary Thomas*, [1894] P. 108, C. A. See title INSURANCE.

SECT. 4. Law Governing Contracts.

circumstances which indicate a contrary intention of the contracting parties (*a*).

Immovables.

A contract relating to immovables is (probably) governed by the *lex situs* (*b*).

Professional services.

A contract for professional services to be rendered by an advocate or other skilled practitioner is, so far as his remuneration is concerned, governed solely by the law and custom of his profession, as, for example, by the custom of the bar to which he belongs (*c*).

Agent.

A contract effected through an agent is unaffected by the law which may be applicable to the relations between the principal and agent (*d*).

Severable contracts.

A contract may be governed by two different laws, where the subject-matter is severable and the intention of the parties that two laws should apply clearly appears (*e*).

Incorporation of foreign law.

Where a foreign law is stated to be incorporated in a contract, the extent of the incorporation is merely a question of the construction of the instrument (*f*).

SECT. 5.—*Legality of Contracts.*

SUB-SECT. 1.—*In General.*

How legality of contract is to be determined.

359. The rule that the essential validity of a contract is governed by the proper law of the contract, as ascertained on the principles set forth above, is one which admits several exceptions (*g*). A distinction is to be drawn between contracts which for some reason or other have no legal effect, as, for example, a contract in English

(*a*) See *Peninsular and Oriental Steamship Co.* v. *Shand* (1865), 3 Moo. P. C. C. (N. S.) 272; *Cohen* v. *South Eastern Rail. Co.* (1877), 2 Ex. D. 253, C. A. These two cases clearly show that here as elsewhere the intention of the parties is the true test; but presumptions as to intention are less easily raised in this class of contract (Dicey, Conflict of Laws, 2nd ed., pp. 580 *et seq.*). *Quære*, as to incidents taking place under the various systems of law through which the carriage extends (*ibid.*, p. 581). See title CARRIERS, Vol. IV., p. 1.

(*b*) *Campbell* v. *Dent* (1838), 2 Moo. P. C. C. 292. See a learned and exhaustive note on this subject in Dicey, Conflict of Laws, 2nd ed., pp. 810—813. Mr. Westlake prefers the proper law of the contract so far as the *lex situs* does not prevent the contract from being executed (Private International Law, 4th ed., p. 285).

(*c*) *R.* v. *Doutre* (1884), 9 App. Cas. 745. The case was that of a barrister, but Lord WATSON'S words at p. 752 are wide enough to cover all professions governed by an etiquette and code of rules of their own. In such a case the *lex loci contractus* or *solutionis* is immaterial. See title BARRISTERS, Vol. II., at p. 393.

(*d*) See *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. 598; *Maspons y Hermano* v. *Mildred* (1882), 9 Q. B. D. 530, C. A.; and compare *Pattison* v. *Mills* (1828), 1 Dow & Cl. 342, H. L.; *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A. In other words, the proper law governing such a contract is not necessarily the same as that governing the contract between the principal and his agent.

(*e*) *Chamberlain* v. *Napier* (1880), 15 Ch. D. 614, where it was held that English and Scotch law applied respectively in the case of a settlement made in Scotland declaring trusts of English realty in English form, and of Scotch personalty in Scotch form; *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202.

(*f*) *Re Suse and Sibeth, Ex parte Dever* (1887), 18 Q. B. D. 660, C. A.; that is, the whole of the foreign law is not necessarily incorporated.

(*g*) See on this difficult subject a very learned note by Mr. Dicey (Conflict of Laws, 2nd ed., pp. 814—821); and also Foote, Private International Jurisprudence, 3rd ed., pp. 385 *et seq.*

law unsupported by consideration, and contracts which are either expressly forbidden by positive law or are not recognised as valid because conflicting with some rule of policy adopted by the courts. It is apprehended that a contract which fell in the first of these two classes would be governed as to its essential validity by its proper law, whatever that might be (*h*); but where a question of the legality or lawfulness of a contract is involved, different considerations apply (*i*).

SECT. 5. Legality of Contracts.

SUB-SECT. 2.—*Contracts illegal by their Proper Law.*

360. A contract illegal by its proper law will not be enforced in England (*k*), and this rule probably holds good even where the contract is one which violates the revenue laws of the country by whose law it is governed (*l*), although foreign revenue laws are generally disregarded by the English courts (*m*).

Illegal by proper law.

SUB-SECT. 3.—*Contracts Illegal by the Lex loci contractus.*

361. There is authority for saying that a contract, the making (as distinct from the performance) of which is illegal by the *lex loci contractus*, is not actionable in England (*n*).

Illegal by *lex loci contractus.*

SUB-SECT. 4.—*Contracts Illegal by the Lex loci solutionis.*

362. A contract illegal by the law of the country where it is to be performed will not be enforced in England (*o*). Thus, an

Illegal by *lex loci solutionis.*

(*h*) Provided always that the *lex fori* does not regard the circumstances which might render the contract invalid by its proper law as conflicting with its own notions of policy or morality. Compare *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A., where this distinction is discussed, and a contract valid by its proper law (that of Scotland), but of a kind not recognised in English law, was nevertheless upheld because not against public policy as defined in England. JOYCE, J., had decided otherwise ([1903] 1 Ch. 933).

(*i*) Dicey, Conflict of Laws, 2nd ed., pp. 545 *et seq.*

(*k*) Westlake, Private International Law, 4th ed., p. 282, citing *Heriz* v. *Riera* (1840), 11 Sim. 318, in which case the contract was both made and (*semble*) to be performed in Spain. The rule may also be deduced from the converse reasoning in *Quarrier* v. *Colston* (1842), 1 Ph. 147. Since persons are unlikely to contract with reference to a law which would make their contract illegal, the absence of authority is not surprising.

(*l*) *Boucher* v. *Lawson* (1734), Lee *temp.* Hard. 84, 194, is not a very conclusive authority the other way.

(*m*) *Planché* v. *Fletcher* (1779), 1 Doug. (K. B.) 251; *James* v. *Catherwood* (1823), 3 Dow. & Ry. (K. B.) 190. Compare *Sharp* v. *Taylor* (1848), 2 Ph. 801.

(*n*) See Foote, Private International Jurisprudence, 3rd ed., p. 385: "The question of legality may arise with reference to the contracting of the agreement and not to its performance. The consideration, on one side or the other, may either be a thing in itself unlawful to exchange for any promise or unlawful with reference to the particular promise for which it is given. There is no authority for saying that the question of legality in such cases as these is determined by any other law than that of the place where the contract is entered into, except the *dictum* in *Robinson* v. *Bland* ((1760) 2 Burr. 1077)." The authorities are nevertheless very scanty. But see *Branley* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N. S.) 63, *per* ERLE, C.J., at p. 72; and compare the reasoning in *Quarrier* v. *Colston*, *supra*, and in *Pattison* v. *Mills* (1828), 1 Dow & Cl. 342, H. L., which are converse cases. Perhaps *Heriz* v. *Riera*, *supra*, is more properly an illustration of this rule.

(*o*) *Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A. Compare *Biggs* v. *Lawrence* (1789), 3 Term Rep. 454; *Clugas* v. *Penaluna* (1791), 4 Term Rep. 466; *Waymell*

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agreement to be performed in England, made in France and valid by French law, will not be enforceable in the English courts if champertous (*p*), nor will any contract made abroad be good in England if it have for its purpose the smuggling of dutiable goods into this country (*q*); but the knowledge that goods sold and delivered abroad may possibly be smuggled into England will not disentitle the vendor to sue for the price (*r*).

But where a contract is made in England and its performance in a foreign country would be a violation of the revenue laws of that country, it will nevertheless be valid in England (*s*).

SUB-SECT. 5.—*Contracts Illegal by English Law.*

Illegal by English law.

363. Contracts which are illegal by the *lex fori* will clearly not be enforceable, whatever may be their effect under other systems of law. No English court would entertain an action based upon a contract which conflicted with, and was in violation of, the rules of English law, even though by every other law which could possibly be relevant its validity was unimpeachable (*a*).

Public policy and morality.

Contracts, whatever their proper law, are illegal in England if contrary to English ideas of public policy (*b*) or morality (*c*), or even if any part of them is so contrary (*d*). Thus, an agreement void by English law (*e*), as in restraint of trade in England (*f*), or one

v. *Need* (1794), 5 Term Rep. 599; *Lightfoot* v. *Tennant* (1796), 1 Bos. & P. 551. Though the principle is clear, it may be pointed out that in all the cases cited the place of performance was England, and the contracts would probably have all been illegal by English law as the *lex fori* whether they had been performed there or elsewhere; the contract in *Lightfoot* v. *Tennant*, *supra*, was in fact in direct violation of an English Act of Parliament (7 Geo. 1, c. 21, s. 2).

(*p*) *Grell* v. *Levy* (1864), 16 C. B. (N. S.) 73. See title ACTION, Vol. I., p. 1.

(*q*) *Clugas* v. *Penaluna* (1791), 4 Term Rep. 466; *Waymell* v. *Need* (1794), 5 Term Rep. 599.

(*r*) *Pellecat* v. *Angell* (1835), 2 Cr. M. & R. 311; compare *Saxby* v. *Fulton* (1908), 99 L. T. 92.

(*s*) *Simeon* v. *Bazett* (1813), 2 M. & S. 94; *Bazett* v. *Meyer* (1814), 5 Taunt. 824, Ex. Ch.; *Sharp* v. *Taylor* (1848), 2 Ph. 801. Compare *Boucher* v. *Lawson* (1734), Lee *temp.* Hard. 84, 194; *Planché* v. *Fletcher* (1779), 1 Doug. (K. B.) 251. The distinction between this rule and that referred to at p. 243, *ante*, is that here the contracts are made in England. Probably this rule only applies to foreign countries strictly so-called, and not to parts of British territory other than England, which are of course foreign countries for most purposes of private international law (see Dicey, Conflict of Laws, 2nd ed., pp. 553—555). But no action lies in England to recover a rate imposed in a colony under a colonial statute (*Sydney Municipal Council* v. *Bull*, [1909] 1 K. B. 7).

(*a*) See Dicey, Conflict of Laws, 2nd ed., pp. 549 *et seq.* For contracts that are illegal by English law, see title CONTRACT.

(*b*) *Hope* v. *Hope* (1857), 8 De G. M. & G. 731, C. A.; *Grell* v. *Levy* (1864), 16 C. B. (N. S.) 73; *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351; *Kaufman* v. *Gerson*, [1904] 1 K. B. 591, C. A. *Quære*, whether a gaming contract not illegal by the *lex loci contractus* can be enforced in England (see *per* COZENS-HARDY, L.J., in *Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A., at p. 756); the language, however, of the Court of Appeal in *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A., seems to suggest that the English courts do not yet regard a gaming contract as involving anything immoral.

(*c*) See *per* WILMOT, J., in *Robinson* v. *Bland* (1760), 2 Burr. 1077, at p. 1084; *Kaufman* v. *Gerson*, *supra*.

(*d*) See *Hope* v. *Hope*, *supra*.

(*e*) *Grell* v. *Levy*, *supra*.

(*f*) *Rousillon* v. *Rousillon*, *supra*.

obtained by moral coercion or duress (*g*) or entered into for the purpose of a collusive divorce (*h*), is illegal in England, even though it be valid by its proper law.

But a contract good by its proper law, though invalid in England, will nevertheless be enforced in England, if not inconsistent with public order or good morals (*i*).

SECT. 6.—*Assignability of Contract.*

Validity of assignment.

364. The assignability of a contract and the effect of the assignment as against the debtor are governed by the proper law of the contract (*a*); but the validity of the assignment itself depends in the case of a debt represented by a document of title or otherwise, such as a negotiable instrument or a policy of insurance, on the law of the place where the assignment takes place (*b*); and in the case of a bare chose in action on the law of the forum for the recovery of the debt, which will usually be the place where the debtor resides (*c*); but both these rules are of course subject to any rules of procedure with regard to the parties to an action on the assignment imposed by the *lex fori* (*d*). Accordingly, the assignability of an English promissory note will be governed by English law, and it will be transferable by delivery in France so as to give the transferee a good title in England, though it may not be so transferable by French law (*e*); but the validity of the delivery itself, as distinguished

(*g*) *Kaufman* v. *Gerson*, [1904] 1 K. B. 591, C. A.

(*h*) *Hope* v. *Hope* (1857), 8 De G. M. & G. 731, C. A.; and see, generally, title CONTRACT.

(*i*) *Quarrier* v. *Colston* (1842), 1 Ph. 147; though since the Gaming Act, 1845 (8 & 9 Vict. c. 109), the decision in this case would be different, *Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A., *per* COLLINS, M.R., at p. 753; *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A.: "The question in each case is whether the foreign law or the private agreement conflicts with a law in which the public order and good morals concerned are essential enough to call into operation the reservation in favour of stringent domestic policy, which in principle is recognised and insisted upon by all civilised nations," *per* VAUGHAN WILLIAMS, L.J., at p. 597. Money lent for gaming in a country where gaming is not illegal is recoverable in England (*Saxby* v. *Fulton* (1908), 99 L. T. 92; and see, generally, title GAMING AND WAGERING).

(*a*) See Westlake, Private International Law, 4th ed., pp. 196—198, 301; Dicey, Conflict of Laws, 2nd ed., pp. 523—525; Foote, Private International Jurisprudence, 3rd ed., pp. 259—264. For Assignment of Contracts generally, see titles CHOSES IN ACTION, Vol. IV., p. 359; CONTRACT.

(*b*) *Alcock* v. *Smith*, [1892] 1 Ch. 238, C. A.; *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677, C. A.; and see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72, and title BILLS OF EXCHANGE, ETC., VOL. II., p. 457; *Lee* v. *Abdy* (1886), 17 Q. B. D. 309 (policy of insurance). In this last case the assignment was invalid by the *lex loci contractus* by reason of coverture, which perhaps introduces different considerations; see, however, *per* WARRINGTON, J., in *Kelly* v. *Selwyn*, [1905] 2 Ch. 117, at p. 121. See also p. 217, *ante*.

(*c*) *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1891] 1 Ch. 536; *Kelly* v. *Selwyn*, [1905] 2 Ch. 117. Perhaps this last case may be also explained on the ground that the subject-matter of the assignment was in effect property situate in England and under the control of the court; compare *Peillon* v. *Brooking* (1858), 25 Beav. 218, and *Dulaney* v. *Merry & Son*, [1901] 1 K. B. 536, *per* CHANNELL, J., at p. 542. But see also *Tyrone (Earl)* v. *Waterford (Marquis)* (1860), 1 De G. F. & J. 613, C. A.; *Guthrie* v. *Walrond* (1883), 22 Ch. D. 573.

(*d*) See p. 302, *post*.

(*e*) *De la Chaumette* v. *Bank of England* (1831), 2 B. & Ad. 385; compare *Innes* v. *Dunlop (Bart.)* (1800), 8 Term Rep. 595.

SECT. 6. **Assignability of Contracts.**

from the right to assign, will be governed by French law as the *lex loci contractus* (*f*).

Assignment by judicial process.

An assignment of a debt by judicial process in the country where the debtor resides, and valid by the law of that country, though not by the law of the creditor's domicil or residence, is an effective assignment in England (*g*).

Funds under control of Court.

Where the English court is administering trusts of English personalty declared by the will of an English testator, the rights of claimants to the fund are regulated by English law, and therefore an assignment of a reversionary interest in the trust property, valid by the law of the country where the assignment took place without notice to the trustees, will not prevail against a subsequent assignment of which notice was given (*h*).

SECT. 7.—*Discharge of Contracts.*

Discharge of contracts.

365. A contract that has been discharged (otherwise than by performance (*i*)) in accordance with or by means of the operation of its proper law (*k*) is discharged also in England, so that no further action will lie upon it in the English courts (*l*). But a contract which is still subsisting and binding by its proper law may, nevertheless, not be actionable in England because the plaintiff's remedy is barred by a Statute of Limitations, and this being a matter of

(*f*) See note (*b*) on p. 245, *ante*.

(*g*) *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1891] 1 Ch. 536. In *Kelly* v. *Selwyn*, [1905] 2 Ch. 117, WARRINGTON, J., observes that the case just cited "merely decided that where there is a *chose in action* owing from persons residing in a particular country (in that case in Scotland) an assignment in that case by process of law of those *choses in action*, valid according to the law of Scotland, would be valid elsewhere" (at p. 121). See also *Inglis* v. *Robertson*, [1898] A. C. 616; and compare *Alcock* v. *Smith*, [1892] 1 Ch. 238, C. A.

(*h*) *Kelly* v. *Selwyn*, *supra*; the assignor here was domiciled in New York. But see note (*c*), p. 245, *ante*; and, generally, titles CHOSES IN ACTION, Vol. IV., p. 359; CONTRACT.

(*i*) A contract is discharged if duly performed, no matter where, this being a question of fact. See, generally, title CONTRACT.

(*k*) Dicey, Conflict of Laws, 2nd ed., pp. 569—571; Westlake, Private International Law, 4th ed., pp. 302, 303; Foote, Private International Jurisprudence, 3rd ed., pp. 457—465. It is submitted that the proper law is that which applies: see especially *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, C. A.: "The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. . . . Therefore, if there be a bankruptcy law *or any other law of such country*, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract and would be applicable to it in the country where the action is brought," *per* Lord ESHER, M.R., at p. 405; *Taylor* v. *Hollard*, [1902] 1 K. B. 676: "The release in the foreign country could not *per se* get rid of a cause of action arising out of a contract to be performed in this country," *per* JELF, J., at p. 682. Compare also *Ralli* v. *Dennistoun* (1851), 6 Exch. 483, at p. 493; *Ellis* v. *M'Henry* (1871), L. R. 6 C. P. 228, at p. 234. It is clear that it is the proper law of the contract which is really referred to in the judgments in both these last two cases.

(*l*) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*, *supra*; *Taylor* v. *Hollard*, *supra*; *Potter* v. *Brown* (1804), 5 East, 124.

procedure is for the *lex fori* (*m*); and conversely, where by the proper law of the contract the remedy is barred so that no action would lie in the foreign country, an action may still be brought in England provided that the period of limitation prescribed by English law has not expired (*n*). On the same principle, where by the proper law of a contract the rights and liabilities of parties, though not discharged, are nevertheless suspended by legislative enactment subsequent to the date of the contract, until a later date than that agreed upon by the parties, the rights of the plaintiff will also be regarded as suspended for the time being under English law (*o*).

Discharge in bankruptcy.

366. A discharge in bankruptcy under the law of a foreign country, which is the proper law of the contract, operates as a discharge from liability under the contract in England (*p*), and conversely a discharge under the law of a country, which is not the proper law of the contract, will not be effective in England (*q*). The domicil of the defendant is immaterial (*r*). But where a discharge in bankruptcy is granted under an Imperial bankruptcy statute, it is effective in all British courts against all the world, whatever be the proper law of the obligation discharged (*s*).

SECT. 8.—*Interest and Measure of Damages.*

Interest.

367. The liability to pay interest and the rate of interest payable are (it is apprehended) governed by the proper law of the contract (*t*), which will, however, in the case of a contract of loan, almost invariably be the *lex loci solutionis* (*a*).

(*m*) *Huber* v. *Steiner* (1835), 2 Bing. (N. C.) 202; and see p. 306, *post*, and the cases there cited.

(*n*) See *Harris* v. *Quine* (1869), L. R. 4 Q. B. 653; *Alliance Bank of Simla* v. *Carey* (1880), 5 C. P. D. 429. But where by the proper law the right as well as the remedy is gone, no action can be brought in England in any circumstances; compare *Harris* v. *Quine*, *supra*, at p. 658. See also title LIMITATION OF ACTION.

(*o*) *Roquette* v. *Overmann* (1875), L. R. 10 Q. B. 525 (enlargement of time for payment and protesting of current bills of exchange by *ex post facto* legislation in France during the war with Germany).

(*p*) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, C. A.

(*q*) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*, *supra*; *New Zealand Loan and Mercantile Agency Co.* v. *Morrison*, [1898] A. C. 349. See also *Smith* v. *Buchanan* (1800), 1 East, 6; *Phillips* v. *Allan* (1828), 8 B. & C. 477; *Bartley* v. *Hodges* (1861), 1 B. & S. 375; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 270.

(*r*) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*, *supra*.

(*s*) *Ellis* v. *M'Henry* (1871), L. R. 6 C. P. 228; *Callander, Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460.

(*t*) This is Dicey's view (Conflict of Laws, 2nd ed., p. 607); Westlake prefers the law of the country where the principal ought to have been paid (Private International Law, 4th ed., p. 288), but it is submitted that Mr. Dicey's statement is more accurate. Questions of interest usually arise in connection with contracts of loan, and the law of the place where the loan is to be repaid will naturally be the law which the parties intend to govern their contract; but it is not difficult to conceive cases where this would not be the case; compare *Lansdowne* (*Marchioness*) v. *Lansdowne* (*Marquis*) (1820), 2 Bli. 60, H. L.

(*a*) See *Connor* v. *Bellamont* (*Earl*) (1742), 2 Atk. 382; *Stapleton* v. *Conway* (1750), 3 Atk. 727; *Bodily* v. *Bellamy* (1760), 2 Burr. 1094; *Dewar* v. *Span* (1789),

SECT. 8. Interest and Measure of Damages.

Damages.

368. The damages recoverable in an action for breach of a contract made abroad will also be determined by the proper law of the contract; that is to say, the law which the parties intended should govern their rights and liabilities (*b*). But where English law, as the *lex fori*, lays down rules in particular cases as to the method in which damages are to be, or may be, assessed, it is apprehended that these rules (which are in effect rules of procedure, and so governed by the *lex fori*) will prevail (*c*).

Part VIII.—Torts.

SECT. 1.—*When Torts committed Abroad are actionable in England.*

Jurisdiction in respect of foreign torts.

369. Over torts committed in England the English courts have jurisdiction, whatever the nationality of the parties may be (*d*); but different considerations arise when an action is brought in England in respect of a personal tort committed abroad. In such a case the English courts do not assume jurisdiction unless the act complained of is both actionable in England and at the same time not justifiable by the law of the place where it was done (*e*). It is not necessary that it should be also actionable (in

3 Term Rep. 425; *Harvey* v. *Archbold* (1825), 3 B. & C. 626; *Arnott* v. *Redfern* (1825), 2 C. & P. 88; *Thompson* v. *Powles* (1828), 2 Sim. 194; *Cooper* v. *Waldegrave* (*Earl*) (1840), 2 Beav. 282; *Furgusson* v. *Fyffe* (1841), 8 Cl. & Fin. 121, H. L. As to interest on bills of exchange, see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 468.

(*b*) See Dicey, Conflict of Laws, 2nd ed., pp. 598-9; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 57; Story, Conflict of Laws, s. 307. There is very little direct English authority except on the particular contracts embodied in bills of exchange, for which see title BILLS OF EXCHANGE ETC., Vol. II., p. 524. But see an American case, *Consequa* v. *Willings* (1816), Peters, 225, *per* WASHINGTON, J., at p. 230: "The rate of damages to be recovered for a breach of contract is a part of the right to which the injured party is entitled, and it is totally distinct from the remedy provided for enforcing it. In the former case the *lex loci* where the contract was made or broken is to prevail, in the latter the *lex loci* of the forum where the remedy is provided."

(*c*) For instance, interest as such is not recoverable in England in an action on a foreign judgment although it may be recoverable in the country where the judgment was pronounced; but it may be recovered in the form of damages in England (*Doran* v. *O'Rielly* (1816), 3 Price, 250, Ex. Ch., *per* GRAHAM, B., at p. 252; *Bann* v. *Dalzell* (1828), 3 C. & P. 376; *McClure* v. *Dunkin* (1801), 1 East, 436. Compare *Baschet* v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73, at p. 78). *Quære*, whether in an action for breach of promise of marriage, of which the proper law was not that of England, a plaintiff could recover in an English court the vindictive damages permitted by English law; *semble*, she could. See p. 305, *post*. For measure of damages, generally, see title DAMAGES.

(*d*) Compare p. 181, *ante*; and see title TORTS.

(*e*) *The Halley* (1868), L. R. 2 P. C. 193; *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch. (see especially *per* WILLES, J., at pp. 28, 29); *The M. Moxham* (1876), 1 P. D. 107, C. A.; *Machado* v. *Fontes*, [1897] 2 Q. B. 231, C. A.; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176, *per* Lord MACNAGHTEN, at p. 182. Compare also *Skinner* v. *East India Co.* (1665), Cowp. 167 (trespass to person); *Blad* v. *Bamfield* (1674), 3 Swan. 604; *Blad's Case* (1673), *ibid.* 603 (trespass to goods and trover); *Mostyn* v. *Fabrigas* (1774), Cowp. 161 (false imprisonment); *Scott* v. *Seymour* (*Lord*) (1862), 1 H. & C. 219 (assault); and see *per* TINDAL, C.J.,

SECT. 1. When Torts committed Abroad are actionable in England.

the ordinary sense) in the foreign country; it is sufficient if it is wrongful and unjustifiable, although giving rise to no civil proceedings for damages (*f*). Thus, the foreign law may regard the act as of a criminal nature only, or it may require the institution of penal proceedings as a condition precedent to the recovery of damages (*g*); probably in the first case, and certainly in the second, the act, if tortious by English law, will be actionable in this country (*h*). Nor will the jurisdiction of the English court be ousted, if it appear that proceedings are in fact pending in a foreign court in respect of the matter complained of, whether these proceedings be of a civil or a criminal nature (*i*). The jurisdiction of the English court can only be ousted by proving an exclusive jurisdiction over the matter by the courts of the foreign country (*k*). The fact that the jurisdiction may be exercised more conveniently by one court than by another does not affect the question (*l*). It is immaterial in any event that one or both of the litigants are of foreign nationality (*m*).

The act complained of may have been wrongful by the law of the foreign country at the time when it was committed; but if the legislature of that country, by retrospective enactment, has subsequently declared it lawful, or indemnified the person who committed it against all consequences, no action will then lie in England in respect of it (*n*). The legislature of a Colony is competent to pass such an enactment (*o*).

Acts of State.

370. Nor have the English courts jurisdiction to entertain any action of tort in this country in respect of acts committed abroad which are of the nature of acts of State of the Government of the foreign country (*p*). The acts of a foreign Government causing

in *Pisoni* v. *Lawson* (1839), 6 Bing. (N. C.) 90, at p. 95; compare also *Evans & Sons* v. *Stein & Co.* (1904), 7 F. (Ct. of Sess.) 65; "*Morocco Bound*" *Syndicate* v. *Harris*, [1895] 1 Ch. 635.

(*f*) *Machado* v. *Fontes*, [1897] 2 Q. B. 231, C. A.; compare also *Scott* v. *Seymour* (*Lord*) (1862), 1 H. & C. 219.

(*g*) *Ibid.*

(*h*) It is scarcely open to doubt since *Machado* v. *Fontes*, *supra*, that an act which is purely criminal in a foreign country and gives rise to no civil right of action at all, is actionable in England, if tortious by English law (but see Westlake, Private International Law, 4th ed., pp. 261—262; Foote, Private International Jurisprudence, 3rd ed., p. 492). The view of WIGHTMAN, J., in *Scott* v. *Seymour* (*Lord*), *supra*, at p. 235, was in favour of a right of action in England, but the other judges (BLACKBURN and WILLIAMS, JJ.) did not concur on the point, and it was not found necessary ultimately to decide it.

(*i*) *Scott* v. *Seymour* (*Lord*), *supra*.

(*k*) Compare *Buenos Ayres and Ensenada Port Rail. Co.* v. *Northern Rail. Co. of Buenos Ayres* (1877), 2 Q. B. D. 210.

(*l*) *Buenos Ayres and Ensenada Port Rail. Co.* v. *Northern Rail. Co. of Buenos Ayres*, *supra*, *per* MELLOR, J., at p. 213; and see p. 298, *post*.

(*m*) See title PRACTICE AND PROCEDURE; compare also *Pisoni* v. *Lawson*, *supra*, *per* TINDAL, C.J., at p. 94: "Suppose an Englishman beats a Frenchman at Boulogne and then comes to England, would not the Frenchman have a right to sue for the assault in our courts?" See also *per* BLACKBURN, J., in *Scott* v. *Seymour* (*Lord*), *supra*, dissenting from the doubt expressed by WIGHTMAN, J., in the same case, and remarks of KENNEDY, J., in *Davidsson* v. *Hill*, [1901] 2 K. B. 606, at p. 618.

(*n*) *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch.

(*o*) *Ibid.*

(*p*) See *Blad* v. *Bamfield* (1674), 3 Swan. 604; *Dobree* v. *Napier* (1836), 2

SECT. 1. When Torts committed Abroad are actionable in England.

injury to individuals are matters not for litigation in the English courts, but for representations through the ordinary diplomatic channels (*q*), and this is the case even where the act of the foreign Government constitutes a violation of a treaty existing between it and this country (*r*), or even where it is contrary to the general principles of public international law (*s*).

Acts lawful where committed.

371. If an act is lawful in the country where it is committed, it is not actionable in England, merely because the person who committed it, being a British subject, is forbidden by English law to enter into the engagement in the course of which the act was done (*t*). No British subject can, of course, plead that his act, wherever committed, if otherwise tortious, was an act of State of the British Government, where the person injured by such act is also a British subject; but this rule does not apply in cases where the plaintiff is a foreigner (*a*).

Measure of damages.

372. The measure of damages in an action in respect of a tort committed abroad is (it would seem) to be governed by the *lex loci actus* (*b*). So the English courts, in a case where the defendant has wrongfully converted the plaintiff's goods or money in a foreign country, will permit the interest to be recovered at the rate current in the country where the conversion took place (*c*). But it may well be that the rules of the *lex fori* will be allowed to increase the amount of damages in certain classes of torts, such for example as those in which, by English law, vindictive damages may be awarded against a defendant (*d*).

SECT. 2.—*Torts in respect of Land situate Abroad.*

Torts in respect of foreign land.

373. To the above rules there is one notable exception. The English courts will not entertain any action for a wrong committed in

Bing. (N. C.) 781; *R.* v. *Lesley* (1860), 29 L. J. (M. C.) 97; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176; compare also *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, C. A. The act of an individual ratified or adopted subsequently by his Government becomes an act of State; see *Buron* v. *Denman* (1848), 2 Exch. 167.

(*q*) See *Blad* v. *Bamfield* (1674), 3 Swan. 604, *per* Lord NOTTINGHAM; compare *Carr* v. *Fracis Times & Co.*, *supra*.

(*r*) *Blad* v. *Bamfield*, *supra*.

(*s*) *Carr* v. *Fracis Times & Co.*, *supra*; *per* Lord LINDLEY, at p. 186.

(*t*) *Dobree* v. *Napier* (1836), 2 Bing. (N. C.) 781 (British subject in service of Queen of Portugal sued for trespass for capturing a British vessel lawfully condemned for blockade running).

(*a*) *Buron* v. *Denman* (1848), 2 Exch. 167. Compare *Walker* v. *Baird*, [1892] A. C. 471; *Poll* v. *Lord Advocate* (1899), 1 F. (Ct. of Sess.) 823.

(*b*) See *Ekins* v. *East India Co.* (1717), 1 P. Wms. 395. See title DAMAGES.

(*c*) *Ibid.*

(*d*) There is little English authority on the point; see, however, *Baschet* v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73; *The Circe*, [1906] P. 1. *Quære*, for example, if in an action brought in England for seduction, which had taken place abroad, the plaintiff would not be permitted to recover vindictive damages, even if the *lex loci actus* only gave an indemnity. In *Baschet* v. *London Illustrated Standard Co.*, *supra*, the *lex fori* and the *lex loci actus* were the same (the action being one for penalties for breach of French copyright), but the language of KEKEWICH, J., seems to indicate that he adopted the scale of

respect of foreign realty, as, for example, trespass to foreign land (*e*). This rule, which was formerly supposed to rest upon the distinction between transitory and local actions, is now declared to be based on a total absence of jurisdiction in the English courts in all such matters; nor has the modification of the rules relating to *venue* (*f*) enlarged the jurisdiction of any English court (*g*). But it seems that, where no question of title is involved, the parties may agree to submit to the jurisdiction of the English courts, and that in that case an action for damages would lie (*h*).

SECT. 3.—*Torts committed on the High Seas.*

Jurisdiction over acts committed on high seas.

374. Torts committed on board ships upon the high seas are regarded as having been committed in the country to which the ship belongs (*i*). The jurisdiction of the English courts extends also over British ships in all tidal waters where great ships do go, even though the ship be moored in a foreign port (*k*). So far, therefore, as torts committed on a foreign ship are concerned the rules of English law as described above are applicable (*l*). In cases where the wrongful act, though committed on the high seas, is not committed on board any ship, and is afterwards the subject of proceedings in the courts of this country, the law applicable is the general law maritime as administered by the English courts; in other words, those rules of the law maritime which have become part and parcel of English municipal law, subject of course to modifications introduced by statute (*m*).

penalties prescribed by English law as the *lex fori*, and not as the *lex loci actus*. Compare Wharton, Conflict of Laws, 2nd ed., at p. 541; and see p. 305, *post*.

(*e*) *Skinner* v. *East India Co.* (1665), Cowp. 167; *Doulson* v. *Matthews* (1792), 4 Term Rep. 503; *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602; compare also *The M. Moxham* (1875), 1 P. D. 107, C. A., *per* JAMES, L.J., at p. 109. Lord MANSFIELD, in *Mostyn* v. *Fabrigas* (1774), Cowp. 161, seems to have thought the action might lie, but this view was decisively repudiated in *Doulson* v. *Matthews*, *supra*. See also p. 201, *ante*.

(*f*) See R. S. C., Ord. 36, r. 1, and title ACTION, Vol. I., at p. 50.

(*g*) See *Mostyn* v. *Fabrigas*, *supra*; *Doulson* v. *Matthews*, *supra* ("It is too late now to inquire whether it were wise or politic to make a distinction between transitory and local actions," *per* BULLER, J., at p. 504). The true rule, which is wholly independent of the rules relating to *venue*, is laid down in *British South Africa Co* v. *Companhia de Moçambique*, *supra*.

(*h*) See *The M. Moxham*, *supra*. JAMES, L.J., points out that in this case the jurisdiction is based on contract only, the parties having agreed that the question of negligence involved and of damage should be decided according to English law.

(*i*) See Dicey, Conflict of Laws, 2nd ed., p. 663; *R.* v. *Carr* (1882), 10 Q. B. D. 76, C. C. R.; *R.* v. *Anderson* (1868), L. R. 1 C. C. R. 161 ("The ship, being a British ship, was . . . a floating island where the British law prevailed," *per* BYLES, J., at p. 168). See also the remarks of PHILLIMORE, J., in *Davidsson* v. *Hill*, [1901] 2 K. B. 606, at p. 617.

(*k*) *R.* v. *Carr*, *supra*; *R.* v. *Anderson*, *supra*. Foreigners on British ships are equally within the jurisdiction *ibid.*). It need hardly be added that the courts of the foreign country where the ship is lying have a concurrent jurisdiction.

(*l*) See p. 248, *ante*. The Court of Admiralty has jurisdiction to entertain an action of tort committed on board a ship on the high seas (*The Ruckers* (1801), 4 Ch. Rob. 73, *per* Lord STOWELL). And see title ADMIRALTY, Vol. I., p. 57.

(*m*) "The high seas . . . are subject to the jurisdiction of all countries. . . . The question of negligence in a collision raised in a suit in this country is to be tried, not indeed by the common law of England; but by the maritime law which is part of the common law of England as administered in this country" (*per* Lord ESHER, M.R., in *Chartered Mercantile Bank of India* v. *Netherlands*

SECT. 3. Torts committed on the High Seas.

Wrongful acts committed on the high seas, but not on board ship, to which the rules of the law maritime have no application, are, it is apprehended, governed by the rules of the *lex fori* (*n*). Thus, an action has been held to lie against the owner of a foreign ship for dropping anchor in so negligent a manner as to injure the plaintiff's submarine cable (*o*).

Fatal Accidents Acts.

The Fatal Accidents Acts, 1846 to 1908 (*p*), apply to the representatives of a foreigner whose death is due to the negligence of the defendants or their servants upon the high seas, at all events if the defendants are British subjects (*q*), and, probably, if they are not (*r*).

Part IX.—Husband and Wife.

MARRIAGE.

SECT. 1.—*General Principles of Validity in English Law.*

SUB-SECT. 1.—*Marriage as recognised by English Law.*

What marriages are recognised by English law.

375. The English courts only recognise as a true marriage one which, in addition to being valid in other respects, involves the essential requirement that it is a voluntary union of one man and

India Steam Navigation Co. (1883), 10 Q. B. D. 521, C. A., at p. 537, citing *The Milan* (1861), 1 Lush. 388, and *The Leon* (1881), 6 P. D. 148.

(*n*) So far as these rules relate to the jurisdiction of the Admiralty Court, whether *in rem* or *in personam*, in the matter of collisions at sea and negligent navigation in general, limitation of liability, and the like, see titles ADMIRALTY, Vol. I., p. 57; SHIPPING AND NAVIGATION. An action *in personam*, for example, will lie in the English court at the suit of the owners of a British vessel against the owners of a foreign vessel for damages caused by collision on the high seas, although by the law of the country to which the foreign ship belongs the master alone, and not the owners, are liable (*The Leon, supra*).

(*o*) *Submarine Telegraph Co.* v. *Dickson* (1864), 15 C. B. (N. S.) 759, It would seem to be immaterial that the negligence occurred within the three-mile limit from the English shore.

(*p*) 9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95; and 8 Edw. 7, c. 7.

(*q*) *Davidsson* v. *Hill*, [1901] 2 K. B. 606, *per* KENNEDY and PHILLIMORE, JJ., dissenting from the opposite view taken by DARLING, J., in *Adam* v. *British and Foreign Steamship Co.*, [1898] 2 Q. B. 430. The Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7, does not give the Admiralty Court jurisdiction over actions under the Fatal Injuries Act, 1846 (9 & 10 Vict. c. 93), *in rem* (*Seward* v. "*Vera Cruz*," *The Vera Cruz* (1884), 10 App. Cas. 59, overruling *The Franconia* (1877), 2 P. D. 163, C. A.).

(*r*) See *per* KENNEDY, J., in *Davidsson* v. *Hill*, *supra*, at p. 615, citing *Mills* v. *Armstrong*, *The Bernina* (1888), 13 App. Cas. 1. It is to be noticed that PHILLIMORE, J., was of opinion that if the *lex loci* was the law maritime, it must now be held that the injury done to the relatives of the dead man is to be deemed an actionable tort even by the law maritime (at p. 618). If, however, the *lex loci* was the law of the country to which the ship on which the accident occurred belonged, the learned judge said he assumed that that law, in the absence of evidence to the contrary, gave a right of action in the circumstances, but expressed no opinion as to what the result would be if no right of action was in fact given (at p. 617). Compare also *Kendrick* v. *Burnett* (1897), 35 Sc. L. R. 62.

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Polygamy.

one woman for life to the exclusion of all others (*a*). No union will be recognised which is founded on principles which are in conflict with those generally recognised in Christendom (*b*). Hence, no marriage will be recognised as valid in England if contracted in a country where polygamy is lawful, and where the marriage does not exclude the possibility of additional wives at a subsequent date (*c*). Nevertheless, even in a country where polygamy is in certain circumstances lawful, the English courts will not refuse to recognise the validity of a marriage essentially monogamous by the *lex loci celebrationis*; but it must be clearly proved that such is the case (*d*).

Incestuous marriages.

The English courts refuse to recognise any marriage regarded as incestuous by the general consent of Christendom (*e*); but the mere fact that English law so regards any particular union is no ground for refusing recognition to a similar union (provided that it is otherwise valid) contracted in a foreign country where it is regarded as legal (*f*). The general condemnation of Christendom is necessary (*g*).

Meaning of "Christendom" and "Christian marriage."

The phrase "Christendom" is used (it seems) to describe civilised nations in general, and not exclusively those which profess the doctrines of Christianity; and a "Christian" marriage means no more than a marriage based on Christian ideas, as defined above, though celebrated in a heathen country with the forms prescribed by the law of the country, and (it would seem to follow) between persons who are not themselves Christians (*h*).

(*a*) "Marriage as understood in Christendom may . . . be defined as the voluntary union for life of one man and one woman to the exclusion of all others," *per* Lord PENZANCE in *Hyde* v. *Hyde* (1866), L. R. 1 P. & D. 130, at p. 133; "A marriage which is not that of one man and one woman to the exclusion of all others, though it may pass by the name of a marriage, is not the status which the English law contemplates when dealing with the subject of marriage," *per* HANNEN, P., in *Brinkley* v. *A.-G.* (1890), 15 P. D. 76, at p. 79. Compare also *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488, H. L., at p. 532, *per* Lord BROUGHAM, L.C.; *Chetti* v. *Chetti* (1908), 25 T. L. R. 146, at p. 150, where stress is laid on the intention of the parties. And see title HUSBAND AND WIFE.

(*b*) *Re Bethell*, *Bethell* v. *Hildyard* (1888), 38 Ch. D. 220 (marriage by an Englishman in South Africa with a Baralong girl, according to the custom of the Baralong tribe).

(*c*) "No Christian country would recognize polygamy or incestuous marriages," *per* Lord CAMPBELL, L.C., in *Brook* v. *Brook* (1861), 9 H. L. Cas. 193, at p. 209; "There is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed and the union of a man and a woman in a Christian country," *per* LUSH, L.J., in *Harvey* v. *Farnie* (1880), 6 P. D. 35, C. A., at p. 53; *Hyde* v. *Hyde*, *supra* (the case of a Mormon marriage).

(*d*) *Brinkley* v. *A.-G.*, *supra*.

(*e*) *Brook* v. *Brook*, *supra*; *Re Bozzelli's Settlement*, *Husey-Hunt* v. *Bozzelli*, [1902] 1 Ch. 751.

(*f*) *Re Bozzelli's Settlement*, *Husey-Hunt* v. *Bozzelli*, *supra*.

(*g*) Such a marriage will be good unless "stamped as incestuous by the general consent of Christendom," *per* SWINFEN EADY, J., in *Re Bozzelli's Settlement*, *Husey-Hunt* v. *Bozzelli*, *supra*, at p. 757. This was a case of marriage with a deceased husband's brother. An obvious illustration is the case of marriage with a deceased wife's sister, contracted abroad before the Deceased Wife's Sister Marriage Act, 1907 (7 Edw. 7, c. 47), which were (technically at all events) incestuous by English law, although actually recognized as valid in English colonies by the Imperial Parliament itself (Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Edw. 7, c. 30)).

(*h*) *Brinkley* v. *A.-G.*, *supra*. The phrase is one of convenience only. The

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Law governing validity of marriage.

SUB-SECT. 2.—*Essential Validity of Marriage.*

376. Subject to what has been said above, the essential validity of a marriage is governed by the *lex domicilii* of the parties (*i*), which must decide the question whether, apart from all forms and ceremonies, the marriage is to be regarded as a good marriage. If by the *lex domicilii* of the contracting parties the marriage is void *ab initio* (and not merely voidable) because prohibited or illegal, it will be equally void in England. The nationality of the parties is immaterial on this point (*k*), as is also the place where the marriage was celebrated (*l*), or the fact that it was sanctioned by the religion which the parties professed (*m*). The marriage must be a good and legal marriage according to the law of the domicil of both contracting parties, and not merely according to the law of the domicil of the husband with this exception, that where the domicil of one of the parties is English and the marriage is celebrated in England, the English Courts will not regard the validity of the marriage as affected if the law of the domicil of the other party imposes an incapacity not recognised by English law (*n*).

It is open to doubt whether the rule that the essential validity of a marriage is governed by the *lex domicilii* of the contracting parties is a question of their capacity to marry, and so one of status. But the capacity to contract is not in every case governed by the *lex*

case cited concerned a marriage in Japan which was proved by evidence to be in fact monogamous in its nature. See also *Ardaseer Cursetjee* v. *Perozeboye* (1856), 10 Moo. P. C. C. 375; *Chetti* v. *Chetti* (1908), 25 T. L. R. 146, and note (*n*), *infra*.

(*i*) *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416; *Brook* v. *Brook* (1861), 9 H. L. Cas. 193; *Re De Wilton, De Wilton* v. *Montefiore*, [1900] 2 Ch. 481; *Re Bozzelli's Settlement, Hussey-Hunt* v. *Bozzelli*, [1902] 1 Ch. 751; *Ogden* v. *Ogden*, [1908] P. 46, C. A.; *Re Green, Noyes* v. *Pitkin* (1909), 25 T. L. R. 222.

(*k*) *Mette* v. *Mette*, *supra*.

(*l*) *Brook* v. *Brook*, *supra*.

(*m*) *Re De Wilton, De Wilton* v. *Montefiore*, *supra*—a case of a Jewish marriage, valid by Jewish custom and by the *lex loci contractus*, between an uncle and a niece both domiciled in England. For an earlier case on Jewish marriages, see *Lindo* v. *Belisario* (1795), 1 Hag. Con. 216.

(*n*) See *Chetti* v. *Chetti*, *supra*, and *Sottomayor* v. *De Barros* (1877), 3 P. D. 1, C. A., and (1879) 5 P. D. 94. The view of the Court of Appeal in the latter case was that "no country is bound to recognise the laws of a foreign State when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England on the ground of an incapacity not recognised by the law of this country" (*per curiam*, at p. 7). And HANNEN, J., in the subsequent proceedings, when it appeared that the husband's domicil at the date of the marriage was in fact English, although the wife was domiciled in Portugal, where the marriage (being one between first cousins) was prohibited, declared the marriage to be good and valid. Westlake, Private International Law, 4th ed., p. 60, criticises the decision, and points out that in *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416, CRESSWELL, J., laid down that "there could be no valid contract unless each was competent to contract with the other"; see also Dicey, Conflict of Laws, 2nd ed., pp. 613, 615, 633, 634. But *Sottomayor* v. *De Barros*, *supra*, was regarded as a binding decision by the Court of Appeal in *Ogden* v. *Ogden*, [1908] P. 46, C. A., and the language of BARNES, P., in *Chetti* v. *Chetti*, *supra*, is adverse to the view expressed by Westlake, and also to that of Foote, Private International Jurisprudence, 3rd ed., pp. 360 *et seq.* See also Dicey, Conflict of Laws, 2nd ed., pp. 613, 615.

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domicilii (*o*), and marriage is in many ways a contract *sui generis* (*p*). It is apprehended, therefore, that the matter is one rather of the legality or illegality of a particular marriage than of the capacity of the persons marrying to enter into the contract of marriage (*q*).

Preliminaries to marriage.

377. A marriage, if illegal or prohibited by the *lex domicilii* of the parties, will not be recognised in England, although celebrated in this country and not illegal or prohibited by English law. It is, however, difficult at times to determine whether in fact the *lex domicilii* prohibits the marriage; but the rule can, it is submitted, be correctly stated thus: Where the *lex domicilii* requires certain preliminaries such as publication of banns, consents of parents, and the like, but does not say that the marriage is void *ab initio* if these are not fulfilled, English law will not regard the marriage as essentially invalid, but will look on the preliminaries as matters of form only, to be referred to the *lex loci contractus* (*r*). It is immaterial that the *lex domicilii* makes the marriage in these circumstances voidable at a subsequent date, if proper proceedings are taken (*s*).

(*o*) See *Male* v. *Roberts* (1800), 3 Esp. 163 (ordinary mercantile contracts); Dicey, Conflict of Laws, 2nd ed., pp. 538 *et seq.* Compare, too, *Ruding* v. *Smith* (1821), 2 Hag. Con. 371, *per* Lord STOWELL: "I do not mean to say that Huber is correct in laying down as universally true that '*personales qualitates aliene, certo loco jure impressus, ubique circumferri et personam comitari*,' that a man being of age in his own country is of age in every other country, be the law of majority in that country what it may" (at p. 391); and *per* Lord MACNAGHTEN in *Cooper* v. *Cooper* (1888), 13 App. Cas. 88: "Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favour of the law of the domicil. It may be that all cases are not to be governed by one and the same rule" (at p. 108).

(*p*) See *per* Lord PENZANCE in *Mordaunt* v. *Mordaunt* (1870), L. R. 2 P. & D. 109, at p. 126.

(*q*) Foote, Private International Jurisprudence, 3rd ed., pp. 72, 73, 365—367. The judgment of the Court of Appeal in *Ogden* v. *Ogden*, [1908] P. 46, C. A., makes the distinction perfectly clear. A *dictum* in the judgment in *Sottomayor* v. *De Barros* (1877), 3 P. D. 1, C. A., at p. 5, is largely responsible for the confusion: "It is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicil"; and this principle was applied to contracts of marriage also by the court. But see *per curiam* in *Ogden* v. *Ogden*, [1908] P. 46, C. A., at p. 74: "It may be questioned whether that sentence" (*i.e.*, the *dictum* just quoted) "is correct, and whether the question of capacity is really raised at all in such a case; that is to say, where both parties are capable of entering into a marriage, but may not marry each other because such a marriage would be illegal in their own country. That is rather a question of illegality than of capacity." The disability pleaded in *Chetti* v. *Chetti* (1908), 25 T. L. R. 146, was perhaps a true example of personal incapacity.

(*r*) See p. 256, *post*; *Ogden* v. *Ogden*, *supra*, where all the earlier cases are discussed; *Lacon* v. *Higgins* (1822), 3 Stark. 178; Westlake, Private International Law, 4th ed., pp. 57—61; Dicey, Conflict of Laws, 2nd ed., pp. 628—630; and compare *Re Alison's Trusts* (1874), 31 L. T. 638. It is submitted that this is the true distinction; there is all the difference between declaring illegal or prohibiting *in toto* a marriage unless certain preliminaries are complied with and permitting a marriage after its celebration to be set aside on the ground of non-compliance. The marriage is at least good until set aside. On the other hand, for example, a bigamous marriage in England does not require the intervention of the courts to be null and void, though it may, of course, be the subject of a nullity suit.

(*s*) *Ogden* v. *Ogden*, *supra*.

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It is said that the English courts will not recognise as essentially valid a marriage prohibited or illegal by the *lex loci contractus*, even though by the *lex domicilii* of the parties it is both legal and valid; but this point is perhaps open to question (*t*). In any case, the English courts would disregard, in the case of a marriage celebrated in England, any prohibition imposed by the *lex domicilii* of either of the contracting parties, if of a penal nature or of a kind not recognised by English law (*a*).

SUB-SECT. 3.—*Forms and Ceremonies of Marriage.*

Forms and ceremonies.

378. From an English standpoint the *lex loci contractus* (or, as it is sometimes called, the *lex loci celebrationis*) alone governs the forms and ceremonies of marriage. A marriage may be good and valid by the *lex domicilii*, but if not also celebrated according to the forms prescribed by the *lex loci contractus* it will not be a valid marriage in England (*b*).

The *lex loci contractus* must be complied with, not only as regards the actual ceremony itself of marriage, but also as regards notices, publication of banns, and all formal preliminaries. Any consents which the *lex loci* may require to be given by parents or guardians are now regarded by English law as part of the formal preliminaries of marriage, and must be obtained when the *lex loci* demands it (*c*).

Absence of consents.

379. The English courts, however, distinguish between cases where a marriage is, by reason of the absence of the necessary consents, voidable at a subsequent date, and cases where, for the same reason, it is void *ab initio* (*d*). If the marriage is celebrated

(*t*) Westlake, Private International Law, 4th ed., pp. 58, 59. It is admitted, however, that there is no case which in terms lays down this rule, and Dicey, Conflict of Laws, 2nd ed., p. 628, note (1), criticises its soundness. A marriage contrary to public policy as interpreted by English law, though good by the *lex domicilii*, might be invalid on this ground; but it is difficult to imagine an example of such a marriage which could be celebrated in England in any legal fashion. A marriage incestuous by the consent of Christendom would, of course, be otherwise invalid (*Re Bozzelli's Settlement, Husey-Hunt* v. *Bozzelli*, [1902] 2 Ch. 751).

(*a*) *Chetti* v. *Chetti* (1908), 25 T. L. R. 146—a case of a marriage in England between a domiciled Englishwoman and a Hindoo, who afterwards alleged that by Hindoo law and religion (the law of his domicil and his personal law) the marriage was invalid. An attainted person may contract a valid marriage (*Kynnaird* v. *Leslie* (1866), L. R. 1 C. P. 389). But the prohibition may, of course, operate even in England to render invalid a marriage celebrated in the country where the prohibition prevails (Westlake, Private International Law, 4th ed., p. 60).

(*b*) *Scrimshire* v. *Scrimshire* (1752), 2 Hag. Con. 395; *Compton* v. *Bearcroft* (1769), 2 Hag. Con., cited at 430, 444; *Middleton* v. *Janverin* (1802), 2 Hag. Con. 437; *Dalrymple* v. *Dalrymple* (1811), 2 Hag. Con. 54; *Herbert* (*Lady*) v. *Herbert* (*Lord*) (1819), 2 Hag. Con. 263; *Latour* v. *Teesdale* (1816), 8 Taunt. 830; *Kent* v. *Burgess* (1840), 11 Sim. 361; *Brook* v. *Brook* (1861), 9 H. L. Cas. 193; *Hyde* v. *Hyde* (1866), L. R. 1 P. & D. 130; *Re Alison's Trusts* (1874), 31 L. T. 638; *Lightbody* v. *West* (1903), 88 L. T. 484, C. A.; *Ogden* v. *Ogden*, [1908] P. 46, C. A. "The *lex loci contractus* must *quoad solemnitates* determine the validity of the contract" (*per* Lord CRANWORTH, in *Brook* v. *Brook*, *supra*, at p. 224). See also *Marshall* v. *Marshall* (1908), *Times*, March 10, and *Re Green, Noyes* v. *Pitkin* (1909), 25 T. L. R. 222.

(*c*) *Scrimshire* v. *Scrimshire*, *supra*; *Middleton* v. *Janverin*, *supra*. Compare *Simonin* (falsely called *Mallac*) v. *Mallac* (1860), 2 Sw. & Tr. 67; *Ogden* v. *Ogden*, *supra*.

(*d*) See p. 255, *ante*.

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in the country where the consents are by the law of the country required, the marriage in either case is invalid in England; but if celebrated in a country where the consents are not necessary, then in the second case only will the English courts refuse to recognise it (*e*). A marriage declared null and void by the courts of a foreign country, owing to the consents required by the foreign law not having been obtained, will be valid in England if celebrated here, and if the consents were of a nature not required by English law (*f*). Where compliance with the forms of the *lex loci* is for any reason impossible, a valid marriage may be contracted by British subjects if celebrated in accordance with the English common law, and by foreigners, so far as English law is concerned, if celebrated (probably) in accordance with the law of their domicil (*g*).

Compliance with local forms impossible.

SECT. 2.—*Marriages valid by English Statutes.*

SUB-SECT. 1.—*Marriages of British Subjects celebrated Abroad* (*h*).

Foreign Marriage Act, 1892.

380. Apart from the general rules as to marriages celebrated abroad which owe their validity in English law to circumstances wholly unconnected with the nationality of the parties contracting them, the marriages of British subjects in foreign countries have received statutory recognition in certain cases, where the ceremony has been conducted in the manner and by the officers prescribed in the Act of Parliament (*i*).

One at least of the parties to the marriage must be a British subject (*k*), and provided that in all other respects the Act has been complied with, the marriage is as valid as though celebrated in the

(*e*) *I.e.*, the marriage is in that case absolutely prohibited by the foreign law, and never comes into existence at all. Compare *Lacon* v. *Higgins* (1822), 3 Stark. 178. Marriages contracted without the consent required by the Royal Marriages Act, 1772 (12 Geo. 3, c. 11), illustrate the principle (*The Sussex Peerage* (1844), 11 Cl. & Fin. 85, H. L.); but it may be doubted if an incapacity imposed by a *privilegium* on so limited a class of individuals would necessarily be recognised by the courts of foreign countries.

(*f*) *Simonin* (falsely called *Mallac*) v. *Mallac* (1860), 2 Sw. & Tr. 67; *Ogden* v. *Ogden*, [1908] P. 46, C. A.

(*g*) See p. 261, *post*; *Ruding* v. *Smith* (1821), 2 Hag. Con. 371; *Lautour* v. *Teesdale* (1816), 8 Taunt. 830. See title HUSBAND AND WIFE.

(*h*) Apart altogether from the statutes referred to in note (*i*), *infra*, a marriage by British subjects celebrated in a foreign country in British form is valid if celebrated in a place which is by a fiction regarded as British territory, such as, *e.g.*, an ambassador's house, or in which British subjects, by treaty or otherwise, still continue to be governed by their national law, as, *e.g.*, in Turkey, China, and other parts of the East. Though this principle of exterritoriality still holds good so far as its effect on marriages is concerned, it is now deprived of much of its importance by the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23). But see *Marshall* v. *Marshall* (1907), *Times*, May 8; (1908) *Times*, March 10.

(*i*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23). This Act repeals the Consular Marriage Act, 1849 (12 & 13 Vict. c. 68), the Consular Marriage Act, 1868 (31 & 32 Vict. c. 61), the Marriage Act, 1890 (53 & 54 Vict. c. 47), and the Foreign Marriage Act, 1891 (54 & 55 Vict. c. 74), and now forms a complete code upon the subject. Power is given by the Act to the Crown to make regulations on various matters connected with the marriages for which the Act provides; and these regulations are contained in the Foreign Marriages Orders in Council of 1892, 1895, and 1903.

(*k*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 1.

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United Kingdom (*l*). Such a marriage will not necessarily be held by a foreign court to possess extra-territorial validity, unless both parties to it were British subjects, but the fact that a foreign court has declared such a marriage to be null and void for want of compliance with the forms of the *lex loci celebrationis* is no ground for an English court regarding it as otherwise than valid in England if celebrated in accordance with the statute (*m*).

Notice of the intended marriage must be given fourteen days before the ceremony, together with certain particulars (*n*), and if the marriage is not celebrated within three months from the expiration of that period a fresh notice is necessary (*o*). Capacity to contract the marriage is governed by the same principles which have already been discussed (*p*); but the consents, if any, required by English law must be given (*q*). The marriage itself must be celebrated by a "marriage officer," as defined by the Act, in his official house, or by some other person in his presence, and there must also be two or more witnesses (*r*).

(*l*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 1.

(*m*) *Hay* v. *Northcote*, [1900] 2 Ch. 262. See on this point Foote, Private International Jurisprudence, 3rd ed., p. 104; Westlake, Private International Law, 4th ed., pp. 62, 63: "The forms of the *lex loci actus* are not imperative, but optional; and the parties may adopt instead the forms which the legislation of their country provides for them in its foreign establishments. This ground will not extend beyond the case in which both the contracting parties are nationals of the State to which the embassy or consulate belongs. If only one of them is such a national, no principle operates to give the other the benefit of the privileged form." The Marriage with Foreigners Act, 1906 (6 Edw. 7, c. 40), is intended to guard against the risks run by British subjects who contract marriages with aliens, either in England or abroad, who may find that though the marriage is good in England, it is not recognised by the other party's personal law. This object is attained by the granting of certificates by proper officers in each country to the effect that no lawful impediment exists to the intended marriage, and contemplates arrangements or conventions between States for the purpose of mutual recognition or assistance.

(*n*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 2.

(*o*) *Ibid.*, s. 6. S. 2 of the Act contemplates that both parties shall have resided in the marriage officer's district for not less than one week before the day on which notice of the marriage is given; but certain modifications have been introduced where one party only has dwelt within the district by the Foreign Marriages Order in Council, 1892, art. 6, which provides also that the Secretary of State may give permission for the marriage if he is satisfied that it is not clandestine, and also by the Foreign Marriages Order in Council, 1903, arts. 1, 2, which in the like case provides that notice may be given by a party residing in a colony or in India to the local marriage registrar three weeks beforehand, who is to give a certificate to that effect for production to the marriage officer.

(*p*) See p. 256, *ante*. See also the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 23.

(*q*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 4. Note that the consents required are those of English law only. There are also provisions enabling persons whose consent is necessary to take steps rendering notices already given void (ss. 4, 5); and the parties must declare on oath before the marriage can take place that the necessary consents have been obtained (s. 7).

(*r*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), ss. 1, 8 (2). The official house of the marriage officer means the office at which he usually transacts his business (*ibid.*, s. 24), such as the official residence of an ambassador. The certificate of the Secretary of State as to any house, office, chapel, or other place being part of the official house of an ambassador or consul is conclusive (*ibid.*, s. 16 (2)).

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381. The following persons are entitled to act as marriage officers: British ambassadors in the countries to which they are accredited (*s*), or any person for the time being performing the duties of the ambassador, or any secretary attached to the Embassy who is appointed for the purpose in writing by the ambassador (*a*); British consuls, governors, high commissioners, residents, and consular or other officers (*b*). Except in the case of ambassadors (*c*), the authority of the marriage officer is derived from a "warrant" signed by the Secretary of State (*d*). Marriages of this kind may be celebrated in British possessions outside the United Kingdom as well as in foreign countries (*e*). Marriage officers.

The marriage officer is entitled to refuse to celebrate a marriage where it would be invalid according to the local law of the foreign country, unless he is satisfied that both parties are British subjects, or, if only one is a British subject, that the other is not a subject or citizen of the foreign country, or, if one is a British subject and the other is a subject or citizen of the foreign country, that there are not sufficient facilities for celebrating the marriage in the foreign country according to its own law (*f*). And if the woman is a British subject and the man is an alien, the marriage officer must be satisfied that the marriage will be recognised by the law of the country to which the alien belongs (*g*). Grounds of refusal to celebrate marriage.

The marriage officer may also refuse to celebrate a marriage which would be inconsistent with international law or the comity of nations (*h*).

Although a certain time of residence is required, and certain consents may be necessary before the marriage officer celebrates the marriage, yet, the marriage once celebrated, no subsequent objections on these grounds are admissible, nor in future proceedings can any evidence be given as to the want of authority of the marriage officer, when the marriage purports to have been duly celebrated by him (*i*). Validity of marriages.

An appeal lies to the Secretary of State against a refusal by the marriage officer to celebrate the marriage (*k*). Appeals.

None of the above provisions as to marriages celebrated abroad apply to marriages of the Royal Family (*l*). Royal Family.

(*s*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 11 (2) (a). "Ambassador" includes a minister and a *chargé d'affaires* (s. 24).

(*a*) Foreign Marriages Order in Council, 1892, art. 1.

(*b*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 11 (2) (b), (c). "Consul" includes a consul-general, vice-consul, pro-consul, consular agent (s. 24).

(*c*) Foreign Marriages Order in Council, 1892, art. 1.

(*d*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 11 (1), (2). The Secretary of State may also authorise by warrant any other person to act as marriage officer (s. 11 (1) (a)).

(*e*) *Ibid.*, s. 11 (2) (c).

(*f*) Foreign Marriages Order in Council, 1892, art. 4.

(*g*) *Ibid.*, art. 5. And see now Marriage with Foreigners Act, 1906 (6 Edw. 7, c. 40).

(*h*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 19.

(*i*) *Ibid.*, s. 13.

(*k*) *Ibid.*, s. 5 (3), s. 19. See also Foreign Marriages Order in Council, 1892, art. 4 (2).

(*l*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 23. Such marriages,

A. Marriage.

Form of ceremony.

382. There is no prescribed form of celebration which must be used unless the marriage officer himself performs the ceremony, which in that case consists of declarations made by each party to the other (*m*); but any form of religious celebration performed by a clergyman or other person may be adopted, provided that it takes place in the presence of the marriage officer (*n*).

Registration of marriages abroad.

383. The Act also makes provision for the due registration of marriages celebrated abroad by marriage officers (*o*). A British consul, if satisfied by personal attendance that a marriage where one at least of the parties is a British subject has been duly celebrated in accordance with the local law of a foreign country, may register the marriage as having been so solemnised, although registration will give it no more validity than it would otherwise have (*p*). A consul can, however, only be required to attend at a marriage celebrated in accordance with the local law in cases where the marriage is celebrated at the place where he is appointed to reside (*q*).

SUB-SECT. 2.—*Marriages of British Subjects on His Majesty's Ships.*

Marriages on His Majesty's ships.

384. Statutory recognition is also given to marriages celebrated on board His Majesty's ships on foreign stations (*r*). One at least of the parties must be a British subject, and the marriage officer, by whom or in whose presence the marriage must be celebrated, is the commanding officer of such rank and of such vessel as the Admiralty instructions for the time being authorise for the purpose (*s*). He must in any event be first satisfied that there are not sufficient facilities for celebrating the marriage on land at the place where the ship is stationed (*t*). Three weeks' notice must be given of the intended marriage either to friends and relatives, or in such a public manner as satisfies the commanding officer that as much notice has been given as would be necessary in England, and that the marriage is not clandestine (*a*). In other respects the rules which have been described above in connection with marriages contracted abroad by British subjects must be complied with (*b*).

wherever they take place, are governed by the Royal Marriages Act, 1772 (12 Geo. 3, c. 11). Compare *The Sussex Peerage* (1844), 11 Cl. & Fin. 85, H. L., and see title CONSTITUTIONAL LAW, *post*.

(*m*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 8 (2).

(*n*) *Ibid.*

(*o*) *Ibid.*, ss. 9, 10. Duplicate registers are kept, and one of them, when filled up, must be forwarded to the Registrar-General in England (s. 10).

(*p*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 18.

(*q*) Foreign Marriages Order in Council, 1892, art. 8. He must also be a proper marriage officer (Foreign Marriages Order in Council, 1895, art. 1).

(*r*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 12.

(*s*) *Ibid.*, s. 12 (b); Foreign Marriages Order in Council, 1892, art. 10 (1).

(*t*) Foreign Marriages Order in Council, 1892, art. 10 (2).

(*a*) *Ibid.*, art. 10 (3).

(*b*) The Confirmation of Marriages on Her Majesty's Ships Act, 1879 (42 & 43 Vict. c. 29), was passed for the purpose of removing doubts as to the validity of such marriages; but the subject is now governed by the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23). But see *Culling* v. *Culling*, [1896] P. 116. As to publication of banns on board ship of a marriage intended to be solemnised in England, Scotland, or Ireland, see the Naval Marriages Act, 1908 (8 Edw. 7, c. 26), and title HUSBAND AND WIFE.

SUB-SECT. 3.—*Marriages within the Lines of a British Army serving Abroad.*

A. Marriage.

Army marriages.

385. All marriages celebrated within the British lines by a chaplain, or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, have equal validity with marriages duly celebrated within the United Kingdom (*c*).

It is immaterial that the marriage takes place without the authority of the commanding officer; it is sufficient if the person who celebrates it is under the commanding officer's orders (*d*). Nor need the army be engaged on a campaign; it is sufficient if it is in occupation of the foreign country, whether the occupation be hostile or not (*e*).

SUB-SECT. 4.—*Marriages where compliance with Local Forms is impossible.*

Marriages on merchant ships.

386. A marriage on board a merchant ship on the high seas appears to be regarded by English law as valid, if valid according to the law of the country to which the ship belongs. A marriage on board a British merchant ship would seem to be governed by the rules of the common law, and not by any statute, nor even (perhaps) by statute and common law combined (*f*).

And where the local law is inapplicable (*g*), or for some other reason cannot be complied with (*h*), a marriage between British subjects (*i*) will be valid if celebrated in accordance with English common law (*k*).

SUB-SECT. 5.—*Marriages Validated by Special Statutes.*

Special statutes.

387. Parliament can, of course, enact that any marriage, however celebrated, shall be valid for all purposes, and many statutes have been passed for the purpose of removing doubts as to the validity of marriages celebrated abroad (*l*). Further, all colonial laws

(*c*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 22. This section of the Act is only declaratory of the existing law. A British army is presumed to carry with it British law (*R.* v. *Brampton* (*Inhabitants*) (1808), 10 East, 282, *per* Lord ELLENBOROUGH).

(*d*) *The Waldegrave Peerage* (1837), 4 Cl. & Fin. 649, H. L.

(*e*) *Ibid.*; compare *Burn* v. *Farrar* (1819), 2 Hag. Con. 369.

(*f*) This is Mr. Dicey's view (Conflict of Laws, 2nd ed., pp. 620, 621); compare *R.* v. *Millis* (1844), 10 Cl. & Fin. 534, H. L. Mr. Dicey does not, however, regard the matter as free from doubt. As to the rules of the common law relating to marriage, see title HUSBAND AND WIFE.

(*g*) As in the case of a wholly uncivilised country, where the parties could not avail themselves of the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23).

(*h*) Mr. Dicey suggests that marriages within the lines of a British army, apart altogether from statute, would be valid on this ground (Conflict of Laws, 2nd ed., p. 622. There must be something more than a mere difficulty in complying with the local law (*Kent* v. *Burgess* (1840), 11 Sim. 361).

(*i*) If the case of a marriage celebrated in such circumstances by persons other than British subjects came before the English courts, it is conceived that the test to be applied would be the view taken of the validity of the marriage by the law of the parties' domicil (Dicey, Conflict of Laws, 2nd ed., p. 622).

(*k*) Cruise on Dignities, p. 276, citing a decision of Lord ELDON; compare also *Lautour* v. *Teesdale* (1816), 8 Taunt. 830, and (perhaps) *Ruding* v. *Smith* (1821), 2 Hag. Con. 371; Dicey, Conflict of Laws, 2nd ed., pp. 621, 622; Westlake, Private International Law, 4th ed., pp. 62, 63.

(*l*) See 17 & 18 Vict. c. 88 (Mexico); 21 & 22 Vict. c. 46 (Moscow, Ningpo, and Tahiti); 22 & 23 Vict. c. 64 (Lisbon); 27 & 28 Vict. c. 77 (the Ionian Islands);

A. Marriage.

establishing the validity of marriages contracted in the colony are effective in all parts of the King's dominions (*m*).

B. DIVORCE AND OTHER MATRIMONIAL CAUSES.

SECT. 1.—*Jurisdiction of the English Courts.*

SUB-SECT. 1.—*Dissolution of Marriage—Divorce à vinculo matrimonii.*

Jurisdiction as to divorce.

388. The English courts have no jurisdiction to pronounce a decree of divorce completely dissolving the marriage-tie—divorce *à vinculo matrimonii*—unless the parties are domiciled within the jurisdiction at the time when the proceedings are commenced (*n*). And this domicil must be a real and genuine domicil, as defined by English law (*o*). It is not sufficient for the parties to consent to the jurisdiction of the English courts, either expressly or impliedly by their conduct. They cannot by such submission give the courts a jurisdiction which they would not otherwise possess (*p*).

Nothing less than domicil in the fullest sense of the term will suffice. No residence which falls short of domicil will give jurisdiction (*q*).

If the fact of domicil at the date of the petition is once established, it is immaterial that the marriage which it is sought to dissolve

Odessa Marriage Act, 1867 (30 & 31 Vict. c. 2); Morro Velho Marriage Act, 1867 (30 & 31 Vict. c. 93); Fiji Marriage Act, 1878 (41 & 42 Vict. c. 61); Basutoland and British Bechuanaland Marriage Act, 1889 (52 & 53 Vict. c. 38).

(*m*) Colonial Marriages Validity Act, 1865 (28 & 29 Vict. c. 64); compare also the Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Edw. 7, c. 30), which enacts that all marriages with a deceased wife's sister celebrated in a Colony where the parties are domiciled and the marriage is legal shall be valid for all purposes, including the succession to real estate. This Act abolishes the effect, so far as the colonies are concerned, of *Birtwistle* v. *Vardill* (1840), 7 Cl. & Fin. 895, H. L.; but it is now rendered unnecessary by the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47).

(*n*) *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517; *Ratcliffe* v. *Ratcliffe* (1859), 1 Sw. & Tr. 467; *Wilson* v. *Wilson* (1872), L. R. 2 P. & D. 435; *Armytage* v. *Armytage*, [1898] P. 178, *per* GORELL BARNES, J., at p. 185; see also *Bater* v. *Bater*, [1906] P. 209, C. A. *Brodie* v. *Brodie* (1861), 2 Sw. & Tr. 259, cannot now be relied on. Where the jurisdiction of the court is disputed, the respondent files an "act on petition," on the hearing of which preliminary questions of domicil and the like are decided; see title HUSBAND AND WIFE, where the general law and practice as to divorce etc. is fully treated.

(*o*) See pp. 182 *et seq.*, *ante*.

(*p*) See *Armitage* v. *A.-G.* (*Gillig* cited), *Gillig* v. *Gillig*, [1906] P. 135, *per* GORELL BARNES, P., at p. 140; *Le Mesurier* v. *Le Mesurier*, *supra*. Compare also *Malone's Divorce* (*Valid Action*) *Bill*, [1905] A. C. 314, where the validity of the divorce of a domiciled Irishman by the English court at a time when it was supposed that submission to the jurisdiction enabled the court to pronounce a decree was sufficiently open to doubt to require an Act of Parliament for the purpose of removing such doubts. The following cases must, since *Armitage* v. *A.-G.*, *Gillig* v. *Gillig*, *supra*, be regarded as overruled, namely, *Bond* v. *Bond* (1860), 2 Sw. & Tr. 93 (appearance without protest); *Zycklinski* v. *Zycklinski* (1862), 2 Sw. & Tr. 420 (application for further particulars by respondent); *Callwell* v. *Callwell* (1860), 3 Sw. & Tr. 259.

(*q*) *Manning* v. *Manning* (1871), L. R. 2 P. & D. 223; *Briggs* v. *Briggs* (1880), 5 P. D. 163. It was once thought that a matrimonial domicil could be more easily acquired than a domicil in the ordinary sense, and that the courts of the country in which the matrimonial home was for the time being situate had jurisdiction to divorce, provided that such residence had not been acquired solely for the purpose of invoking the jurisdiction, but this view has been decisively repudiated (*Le Mesurier* v. *Le Mesurier*, *supra*).

was contracted elsewhere than in England (*a*), or that the parties at the time of the marriage were domiciled abroad (*b*), or that the parties are not British subjects (*c*), or reside out of the jurisdiction (*d*), or that the misconduct alleged took place abroad (*e*).

The matrimonial domicil differs in no degree from domicil as ordinarily defined (*f*). It is the domicil of the husband (*g*), and the wife cannot acquire a domicil separate from that of her husband (*h*). But (probably) the English courts may decree a divorce in favour of a wife who has been deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, provided that at the moment when the desertion or separation took place she was domiciled with her husband in England, and that at the time of the commencement of the suit she is still in England (*i*).

And (probably) the English courts can decree a divorce in favour of a wife whose domicil at the time of her marriage was in this country,

(*a*) *Wilson* v. *Wilson* (1872), L. R. 2 P. & D. 435; *Ratcliff* v. *Ratcliff* (1859), 1 Sw. & Tr. 467.

(*b*) *Wilson* v. *Wilson*, *supra*.

(*c*) *Goulder* v. *Goulder*, [1892] P. 240; *Dolphin* v. *Robins* (1859), 7 H. L. Cas. 390.

(*d*) Compare *Ratcliff* v. *Ratcliff*, *supra*; *Niboyet* v. *Niboyet* (1878), 4 P. D. 1. The decision in *Deck* v. *Deck* (1860), 2 Sw. & Tr. 90, cannot, it is submitted, now be supported.

(*e*) *Ratcliff* v. *Ratcliff*, *supra*; *Brodie* v. *Brodie* (1861), 2 Sw. & Tr. 259. Remarks by Lord WESTBURY suggesting a contrary view in *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55, at p. 86, were *obiter* only, and do not appear to have been followed. See Westlake, Private International Law, 4th ed., p. 84.

(*f*) *Le Mesurier* v. *Mesurier*, [1895] A. C. 517. The decision in *Niboyet* v. *Niboyet*, *supra*, may now be regarded as overruled, as well as that in *Ingham* v. *Sachs* (1886), 56 L. T. 920. See, on this case, Foote, Private International Jurisprudence, 3rd ed., p. 121, citing *Law Magazine and Review*, 4th Ser., Vol. XIII., p. 85.

(*g*) *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488, H. L.; see *Firebrace* v. *Firebrace* (1878), 4 P. D. 63, *per* HANNEN, P., at p. 67. It is sufficient to state the husband's domicil in the petition, "unless the petitioner is asserting a domicil for the wife different from that of the husband" (Divorce Rule 220, with the additional direction noted in *Re Clark's Petition* (1905), 75 L. J. (P.) 7, at p. 8; 22 T. L. R. 158.

(*h*) *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574 (in this case it was denied that the fact of the husband having given his wife good grounds for living apart from him was in any way material); *Burton* v. *Burton* (1873), 21 W. R. 648; *Le Sueur* v. *Le Sueur* (1876), 1 P. D. 139, does not, it is apprehended, go so far. The wife in that case was deserted in a foreign country where the matrimonial domicil was situate and came to England afterwards.

(*i*) There is no direct decision to this effect, but it is supported by several *dicta*. See *Armytage* v. *Armytage*, [1898] P. 178, *per* GORELL BARNES, J., at p. 185, where the ground of the jurisdiction is stated to be that the court, in order to meet the injustice which might be done by compelling the wife to follow her husband from country to country, will, without necessarily resorting to the doctrine that the wife can acquire a separate domicil, refuse to allow him to assert for the purposes of the suit that he has ceased to be domiciled in this country. See also *Niboyet* v. *Niboyet*, *supra*, *per* BRETT, L.J., at p. 14; *Firebrace* v. *Firebrace*, *supra*, *per* HANNEN, P., at p. 67; *Briggs* v. *Briggs* (1880), 5 P. D. 163, *per* HANNEN, P., at p. 165 (commenting on the doubt as to the extent of the rule, that the wife's domicil follows that of the husband in all cases, expressed by Lord WESTBURY in *Pitt* v. *Pitt* (1864), 4 Macq. 627, at p. 640); *Ogden* v. *Ogden*, [1907] P. 46, C. A., *per cur.*, at p. 78. This is in no way inconsistent with *Le Sueur* v. *Le Sueur*, *supra*, where the separation took place abroad. The decision in *Santo Teodoro* v. *Santo Teodoro* (1876), 5 P. D. 79, could not, it is submitted, be now supported. See also p. 192, *ante*.

B. Divorce and other Matrimonial Causes.

and whose marriage, though valid by the laws of this country, has been declared void by the courts of her husband's domicil (*k*).

The English courts have no jurisdiction over a co-respondent domiciled abroad (*l*), and a petitioner may obtain leave to proceed without citing him (*m*); but the proper course is to give him notice of the proceedings so that he may come in and defend if he so desires (*n*), or apply to be dismissed (*o*).

SUB-SECT. 2.—*Judicial Separation—Divorce à mensa et thoro.*

Necessity of residence.

389. Suits for judicial separation—divorce *à mensa et. thoro*—being instituted primarily not for the purpose of dissolving the marriage, but for the protection of the wife or husband, as the case may be, the English courts do not hold that an English domicil is necessary in order to give them jurisdiction, because no change of *status* of either party is involved by the making of such a decree. It is sufficient if the parties are resident (that is to say, have their matrimonial residence) within the jurisdiction at the time when the suit is commenced (*p*). In laying down this rule, the court is exercising the old jurisdiction of the Ecclesiastical Courts (*q*). The fact that the misconduct on which the petition is based took place abroad is immaterial (*r*). It is apprehended that something more than mere temporary residence is necessary (*s*), and, *à fortiori*, if such residence is taken up for the purposes of the suit only.

Operation of decree.

390. A decree of judicial separation operates to release the party in whose favour it is granted from certain obligations of the marriage-tie, and, further, to confer certain rights as regards alimony and (in the case of a woman) as regards after-acquired property, in respect of which she is treated as a *feme sole* (*t*), but it does not operate to dissolve the marriage and at the same time to impose a disability on the parties to re-marry. A decree of judicial separation therefore will have no effect outside the jurisdiction of the court which

(*k*) *Ogden* v. *Ogden*, [1908] P. 46, C. A., cited note (*k*), p. 268, *post*.

(*l*) *Levy* v. *Levy and De Romance*, [1908] P. 256; compare *Grange* v. *Grange and Arendt*, [1892] P. 245; *Gaynor* v. *Gaynor* (1862), 31 L. J. (P. M. & A.) 116; *Warwick* v. *Warwick and Giovanni* (1907), *Times* (July 25). In *Wray* v. *Wray and D'Almeida*, [1901] P. 132, substituted service was allowed on a co-respondent apparently domiciled in Portugal, but the point as to jurisdiction was not taken.

(*m*) *Baker* v. *Baker and Dwyer*, [1908] P. 257. A co-respondent domiciled abroad will on his own application be dismissed from a suit, even though he has entered an appearance without protest (*ibid.*). See also *Fairfax* v. *Fairfax and De la Cruz* (1909), 25 T. L. R. 213.

(*n*) *Boger* v. *Boger*, [1908] P. 300. See title HUSBAND AND WIFE.

(*o*) *Fairfax* v. *Fairfax and De la Cruz*, *supra*.

(*p*) *Christian* v. *Christian* (1897), 78 L. T. 86; *Armytage* v. *Armytage*, [1898] P. 178, *per* GORELL BARNES, J., at p. 195; *Chetti* v. *Chetti* (1908), 25 T. L. R. 146. For the law and practice as to judicial separations generally, see title HUSBAND AND WIFE.

(*q*) *Armytage* v. *Armytage*, *supra*, *per* GORELL BARNES, J.; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22. In *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, Lord WATSON, at p. 526, seems to assert that the jurisdiction is founded on "the rules of the *jus gentium*," but this is only going a step further back. See also *Von Eckhardstein* v. *Von Eckhardstein* (1907), 23 T. L. R. 539, 593, C. A.

(*r*) *Armytage* v. *Armytage*, *supra*.

(*s*) Foote, Private International Jurisprudence, 3rd ed., p. 123.

(*t*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 25, 45 etc.

decrees it (*u*), nor, as it would appear, even within the jurisdiction, if both parties afterwards abandon their residence in England (*a*).

The court has jurisdiction, after decreeing judicial separation, to give directions as to the custody of the children of the marriage (*b*).

SUB-SECT. 3.—*Restitution of Conjugal Rights.*

Restitution suits.

391. If both parties are resident within the jurisdiction of the English courts at the date when the suit is commenced, the English courts have jurisdiction to make a decree for the restitution of conjugal rights (*c*). And it seems, at any rate in cases where the parties are domiciled or, it is submitted, usually living within the jurisdiction, that service of the petition in such a suit may now be effected abroad, if the respondent is temporarily resident out of England (*d*). The decree itself may also in the same circumstances be served abroad, provided that the respondent will be able to comply with the decree within the time limited, but not otherwise (*e*).

The courts will not necessarily stay the suit of a wife for restitution of conjugal rights because the husband has commenced divorce proceedings abroad (*f*).

SUB-SECT. 4—*Nullity of Marriage.*

Nullity suits.

392. The English courts have jurisdiction, apart from all questions either of domicil or residence, to adjudicate upon the validity of a marriage celebrated in this country and if it be found to be invalid to declare it null and void (*g*). The ground of this jurisdiction is said to be found in the right claimed by the courts of all countries to inquire into the validity or invalidity of contracts entered into within their jurisdiction (*h*).

(*u*) *Quœre*, even if the parties happen to be domiciled as well as resident within the jurisdiction (see Foote, Private International Jurisprudence, 3rd ed., p. 123).

(*a*) *Per* GORELL BARNES, J., in *Armytage* v. *Armytage*, [1898] P. 178, at p. 196; Foote, Private International Jurisprudence, 3rd ed., p. 123.

(*b*) *Armytage* v. *Armytage*, [1898] P. 178.

(*c*) *Thornton* v. *Thornton* (1886), 11 P. D. 176, C. A.; compare also *Firebrace* v. *Firebrace* (1878), 4 P. D. 63, language of HANNEN, P., at p. 67; *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, *per* Lord WATSON, at p. 526.

(*d*) *Bateman* v. *Bateman*, [1901] P. 136; *Dicks* v. *Dicks*, [1899] P. 275.

(*e*) *Dicks* v. *Dicks*, *supra*. Under the old ecclesiastical practice a petition for restitution of conjugal rights could not, it would seem, be served out of England; see *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574. *Firebrace* v. *Firebrace*, *supra*, and *Chichester* v. *Chichester* (1885), 10 P. D. 186, must now be regarded as to some extent overruled on this point. The reason formerly given was that the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 41, 42, did not mention these petitions; but according to GORELL BARNES, J., in *Dicks* v. *Dicks*, *supra*, at p. 277, the law with regard to them is altered by the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68). The learned judge points out that in the earlier cases the respondent was *domiciled* abroad, except in *Pearson* v. *Pearson* (1864), 33 L. J. (P. M. & A.) 157, where the decree was ordered to be served on the respondent when he returned from Shanghai. The impossibility of enforcing the decree where the respondent is not resident in this country and is domiciled abroad is obvious. But in *Firebrace* v. *Firebrace*, *supra*, though the difficulty is pointed out (at p. 68), the decision rests on the ground that the respondent was a foreigner who had quitted England.

(*f*) *Thornton* v. *Thornton*, *supra*. Compare *Von Eckhardstein* v. *Eckhardstein* (1907), 23 T. L. R. 539, 593, C. A. (judicial separation).

(*g*) *Simonin* (falsely called *Mallac*) v. *Mallac* (1860), 2 Sw. & Tr. 67; *Linke* v. *Van Aerde* (1894), 10 T. L. R. 426.

(*h*) *Simonin* (falsely called *Mallac*) v. *Mallac*, *supra*; *Sottomayor* v. *De Barros*

B. Divorce and other Matrimonial Causes.

Apart from this, and in all other cases, it would seem that the court assumes jurisdiction in a nullity suit, if the respondent is resident within the jurisdiction at the date of the petition (*i*).

SUB-SECT. 5.—*Jactitation of Marriage.*

Jactitation of marriage.

393. Residence of the respondent within the jurisdiction appears to be equally the test of the jurisdiction of the English courts in suits of jactitation of marriage (*k*).

SUB-SECT. 6.—*Alimony.*

Alimony.

394. The English courts have power to allot alimony *pendente lite*, even though a substantial question as to the jurisdiction of the courts has been raised by the other party to the suit and awaits determination (*l*); but it is a matter of discretion whether alimony shall be allotted in any particular case (*m*).

The courts will not restrain a husband from removing his property out of the jurisdiction, for the purpose of defeating a wife's right to alimony, before the order for alimony is made (*n*).

SECT. 2.—*Foreign Decrees of Divorce.*

SUB-SECT. 1.—*Foreign Decrees of Dissolution of Marriage.*

Foreign divorce.

395. The English courts do not recognise as possessing extra-territorial validity any decree of divorce pronounced by the courts of a foreign country (including for this purpose those of Scotland and Ireland (*o*)), unless at the date of the suit the parties were domiciled

(1877), 2 P. D. 81; *Ogden* v. *Ogden*, [1908] P. 46, C. A. Westlake, however (Private International Law, 4th ed., p. 90), is of opinion that since the R. S. C., 1883, this reason no longer holds good. The R. S. C., he points out, "have abandoned the *forum contractus celebrati* for the actions to which they apply, even could that *forum* be extended to the case where the existence of the contract is in question" (*ibid.*). He thinks, nevertheless, that the jurisdiction may be defended on the ground that the court ought to be permitted to "correct the civil register of the country."

(*i*) See *per* JAMES, L.J., in *Niboyet* v. *Niboyet* (1878), 4 P. D. 1, at p. 9; Westlake, Private International Law, 4th ed., p. 89. Compare also *Roberts* v. *Brennan*, [1902] P. 143 (marriage celebrated abroad), in which Sir FRANCIS JEUNE followed *Niboyet* v. *Niboyet*, *supra*, on this point. See also *Ogden* v, *Ogden*, *supra*. In *Johnson* v. *Cooke*, [1898] 2 I. R. 130, stress seems to have been laid by the Irish court rather on the fact of domicil. The residence must, it is submitted, be a real residence, and not a mere transitory sojourn.

(*k*) *Per* BRETT, L.J., in *Niboyet* v. *Niboyet*, *supra*, at p. 19. Though the learned judge's views expressed in the same judgment as to the jurisdiction in suits for judicial separation and restitution of conjugal rights have now been definitely overruled, it appears to be the accepted opinion in jactitation suits that residence alone gives jurisdiction; see Westlake, Private International Law, 4th ed., pp. 88, 89.

(*l*) *Ronalds* v. *Ronalds* (1875), 3 P. & D. 259.

(*m*) *Ibid.*

(*n*) *Newton* v. *Newton* (1885), 11 P. D. 11 (alimony *pendente lite*).

(*o*) Scotland and Ireland are of course foreign countries for all purposes so far as the rules of private international law are concerned; compare *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574. There is, as a matter of fact, no court in Ireland with jurisdiction completely to dissolve a marriage, and to enable this to be done an Act of Parliament is required (compare *Malone's Divorce* (*Valid Action*) *Bill*, [1905] A. C. 314; *Grimshaw's Divorce* (*Validation*) *Bill* (1907), 51 Sol. Jo. 529, H. L.). In Scotland a divorce *à vinculo* as well as *à mensa et thoro* can be granted on grounds which would not alone entitle the petitioner to a decree in England.

within the jurisdiction of the court pronouncing it (*p*). As the English courts themselves claim no jurisdiction to dissolve the marriage of persons not domiciled in this country, so also they refuse to admit that anything short of domicil can give the foreign court jurisdiction to decree a divorce which will be valid in England (*q*) and will carry with it the necessary legal consequences in this country. The courts of a foreign country may, of course, claim to exercise the right of dissolving the marriage of persons subject to their jurisdiction, without regard to any question of domicil; and no English court would deny that, within the limits of the foreign court's jurisdiction, a decree of divorce so pronounced would be good and valid (*r*). To hold otherwise would be to dictate to a foreign country the principles which it should adopt in the administration of its own municipal law; but to a divorce so pronounced the English court would deny a validity outside the jurisdiction which granted it (*a*), and would not, for example, hesitate to convict of bigamy any British subject so divorced who re-married subsequently (*b*). Residence, therefore, in the foreign country, if not amounting to domicil, is immaterial (*c*); *à fortiori*, if the residence is not even a *bonâ fide* residence, but has been taken up for the purpose of obtaining a divorce (*d*).

Indian divorce.

Although the general rule is as above stated, it is of course competent for the legislature by Act of Parliament to make exceptions in particular cases. Thus, jurisdiction has been given to the Indian courts to decree a divorce in cases where the petitioner professes the Christian religion and is merely resident in India at the date of the petition (*e*). It is, however, clear that this enactment

(*p*) *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, where all the preceding decisions of importance are fully discussed. This was a decision of the Privy Council, and not of the House of Lords, but it has been approved and followed by the Court of Appeal in *Bater* v. *Bater*, [1906] P. 209. Compare also *Ogden* v. *Ogden*, [1908] P. 46, C. A., and *Re Stirling*, *Stirling* v. *Stirling*, [1908] 2 Ch. 344. The earlier cases to which reference may be made are *Conway* (*otherwise Beazley*) v. *Beazley* (1831), 3 Hag. Ecc. 639; *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488, H. L.; *Dolphin* v. *Robins* (1859), 7 H. L. Cas. 390; *Tollemache* v. *Tollemache* (1859), 1 Sw. & Tr. 557; *Birt* v. *Bontinez* (1868), L. R. 1 P. & D. 487; *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55; *Shaw* v. *A.-G.* (1870), L. R. 2 P. & D. 156; *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; *Scott* v. *A.-G.* (1886), 11 P. D. 128; *Bonaparte* v. *Bonaparte*, [1892] P. 402; *Green* v. *Green*, [1893] P. 89; *Niboyet* v. *Niboyet* (1878), 4 P. D. 1, is practically overruled by *Le Mesurier* v. *Le Mesurier*, *supra*; and *McCarthy* v. *De Caix* (1831), 2 Cl. & Fin. 568, was dissented from in *Harvey* v. *Farnie*, *supra*. In *Connelly* v. *Connelly* (1851), 7 Moo. P. C. C. 438, mutual vows of chastity taken by permission of the Pope were set up as a defence to a petition for restitution of conjugal rights, and the court proceeded to inquire what effect such vows were held to have by the law of the domicil at the time of the separation.

(*q*) A "matrimonial domicil" acquired by residence as distinct from "domicil" in the ordinary sense is not recognised in English law as giving any jurisdiction to divorce (*Le Mesurier* v. *Le Mesurier*, *supra*).

(*r*) See *Green* v. *Green*, *supra*.

(*a*) *Le Mesurier* v. *Le Mesurier*, *supra*.

(*b*) *The Trial of Earl Russell*, [1901] A. C. 446.

(*c*) *Le Mesurier* v. *Le Mesurier*, *supra*.

(*d*) See *Bonaparte* v. *Bonaparte*, [1892] P. 402. *Lolley's Case* (1812), 2 Cl. & Fin. 567, may perhaps still be quoted as an authority on this point, if any further authority is required; but since *Bater* v. *Bater*, [1906] P. 209, C. A., little weight can be attached to it from any point of view.

(*e*) Indian Divorce Act, No. 4 of 1869. Compare the cases of *Warter* v.

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in no way affects the general principle which insists on domicil as the test of jurisdiction.

Validity of foreign divorce.

396. A divorce pronounced by the court of the country of the domicil is recognised as valid in England (*f*). But, further, the English courts will recognise as having extra-territorial validity any decree of divorce which is also recognised as valid by the courts of the country of the domicil, whether those courts have themselves pronounced the decree or not (*g*). Reference must therefore always be made to the law of the domicil at the date of the divorce, wherever that divorce may have been obtained, and provided that the courts of the country of the domicil recognise its validity the English courts will give effect to it (*h*).

It is apprehended, also, that the English courts will concede to a foreign court the same jurisdiction which they themselves assume (*i*) in the case of a petition for divorce by a wife deserted by her husband, who was up to the date of the desertion domiciled with her husband in the foreign country, and will recognise the validity of a divorce so obtained (*j*).

Marriage valid in England, but void abroad.

And (probably) in the case of a wife whose marriage is valid by English law, although declared null and void by the courts of the husband's domicil, the English courts may have jurisdiction to entertain a petition for divorce (*k*), since it would be a mockery to

Warter (1890), 59 L. J. (P.) 87; and *Thornton* v. *Thornton* (1886), 11 P. D. 176, C. A. It is open to doubt whether the Indian Divorce Act of 1869, which is an Act promulgated by the Governor-General of India in Council, enables the Indian courts to decree a dissolution of marriage so as to give the decree an extra-territorial validity. The Act was passed at a time when presumably residence, and not domicil, was regarded as the test of jurisdiction, and it may well be that Indian divorces can claim no extra-territorial validity since *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517. It may be argued that, since the Governor-General derives his power of promulgating statutes in India from an Act of the Imperial Parliament (*i.e.*, East India Council Act, 1861 (24 & 25 Vict. c. 67), ss. 39—43), the courts of this country would be bound to give effect to them; but the same argument would apply to the case of any self-governing Colony, and a divorce founded on residence only decreed by a colonial court would probably not be recognised in England, although the colonial legislature might have enacted that residence, and not domicil, should be the test. The subject is discussed by Dicey, Conflict of Laws, 2nd ed., Appendix, No. 14, pp. 800 *et seq.*, who comes with some hesitation to the conclusion that a divorce under the Indian Divorce Act has extra-territorial validity. An Imperial statute, however, for the purpose of removing doubts seems eminently desirable.

(*f*) See *Bater* v. *Bater*, [1906] P. 209, C. A.; and p. 263, *ante*.

(*g*) *Armitage* v. *A.-G.* (*Gillig* cited), *Gillig* v. *Gillig*, [1906] P. 135. In this case the domicil was in New York, but the divorce had been obtained in South Dakota, where residence for a certain period, and not domicil, gave jurisdiction to pronounce a decree. The divorce so obtained was, however, regarded as valid by the New York courts, and, on proof of this being given, GORELL BARNES, P., held that it must also be regarded as valid in England.

(*h*) *Armitage* v. *A.-G.* (*Gillig* cited), *Gillig* v. *Gillig*, *supra*.

(*i*) See note (*i*) on p. 263, *ante*,

(*j*) See *per* GORELL BARNES, P., in *Ogden* v. *Ogden*, [1908] P. 46, C. A.

(*k*) Although not necessary for the decision in the case, this view is clearly indicated in the judgment of the Court of Appeal in *Ogden* v. *Ogden*, [1908] P. 46, C. A. (judgment of the court delivered by GORELL BARNES, P., at p. 82). "If the country of the husband's domicil refuses to recognise the marriage, and therefore cannot and will not entertain a suit for divorce against him, the justice and reasonableness of the international rule" (*i.e.*, that domicil

refer a wife in such circumstances to the courts of a country for relief when those courts have already declared that no marriage exists, and that in consequence there is no marriage which can be dissolved (*l*).

Finality of foreign decree.

397. In considering the validity of a foreign divorce it is quite immaterial that the divorce was granted for reasons which, in the view of the English law, would not entitle a petitioner to a decree at all in England (*m*), or that the marriage sought to be dissolved abroad was originally celebrated in England (*n*). The foreign court, however, which pronounces the decree must be competent to do so by the laws of the country which give it jurisdiction (*o*). But the decree once pronounced, being a judgment affecting status, is in the nature of a judgment *in rem* (*p*), and cannot, therefore, be set aside or impeached in this country on the ground of fraud by a person who was not a party to the proceedings, or by reason of the concealment of material facts the disclosure of which might have led the foreign court to come to a different decision (*q*). Whether subsequent proof of collusion between the parties would render the decree invalid in England seems to be open to some doubt (*r*).

can alone give jurisdiction to divorce) "ceases to be apparent, and the wife having no right of suit whatever against the husband in his country, and having been left in the country of her original domicil where the marriage was celebrated and is recognised as binding on her and him, it would seem reasonable to permit her to sue in the latter country for the dissolution of the tie which is recognised therein, though not in the foreign country, in case she has grounds of suit which would entitle her to a divorce if her husband had been domiciled in her country; in other words, to treat her as having a domicil in her own country which would be sufficient to support a suit. No general rule of law would then really be infringed. The necessities of this case would call for the intervention of the courts of her own country in order to do her justice and release her from a tie recognised in the one country though not in the other." The respondent in *Ogden* v. *Ogden*, [1908] P. 46, C. A., had in fact petitioned some years before for a divorce, but JEUNE, P., had held that in the circumstances he had no jurisdiction. The remarks of the Court of Appeal above quoted show how the difficulty may in future be solved.

(*l*) *Ogden* v. *Ogden*, *supra;* and see p. 263, *ante*.

(*m*) *Bater* v. *Bater*, [1906] P. 209, C. A. The contrary view was finally laid to rest in this case, although it had been doubted and disapproved for many years; see also *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C. A., where an American divorce on the grounds of the respondent's violent temper was held good. But it seems that in Scotland the rule is different (*Re Stirling*, *Stirling* v. *Stirling*, [1908] 2 Ch. 344).

(*n*) *Bater* v. *Bater*, *supra*. See also *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; *Scott* v. *A.-G.* (1886), 11 P. D. 128. In *Dolphin* v. *Robins* (1859), 7 H. L. Cas. 390, and *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55, the decisions seem to be partly based on the fact that England was the *lex loci celebrationis*. *Lolley's Case* (1812), 2 Cl. & Fin. 567, is now finally discredited (see *Bater* v. *Bater*, *supra*), and must be regarded as applying only to the particular facts on which the decision was based; *Tovey* v. *Lindsay* (1813), 1 Dow, 117, H. L., and *McCarthy* v. *De Caix* (1831), 2 Cl. & Fin. 568, are equally no longer law.

(*o*) *Bater* v. *Bater*, *supra; Birt* v. *Bontinez* (1868), L. R. 1 P. & D. 487; *Shaw* v. *A.-G.* (1870), L. R. 2 P. & D. 156. See also *Harvey* v. *Farnie* (1882), 8 App. Cas. 43.

(*p*) See p. 296, *post*.

(*q*) *Bater* v. *Bater*, *supra*.

(*r*) See *Shaw* v. *Gould*, *supra*. The divorce which was obtained by fraud and collusion in *Bonaparte* v. *Bonaparte*, [1892] P. 402, was in fact invalid because the parties were not domiciled in Scotland; but it was there held that the fraud of which the petitioner in the subsequent nullity proceedings had

B. Divorce and other Matrimonial Causes.

Mere irregularities of procedure, however, will not invalidate the decree, if in fact the court was a competent court acting within its jurisdiction and no substantial injustice (according to English ideas) was done (*s*). But a decree pronounced in a foreign court in circumstances which make the proceedings contrary to natural justice will not be recognised in England (*t*)—if, for instance, the respondent had no notice that proceedings had been instituted against him (*a*).

It has been suggested that only the decree of a foreign Christian tribunal will be recognised in England (*b*); but it is apprehended that the phrase is used merely to express the tribunal of a country universally regarded as civilised, and whose jurisprudence conforms to modern ideas of justice and equity (*c*).

Effect of restrictions on re-marriage.

398. The foreign decree, in order to be effectual in this country, must dissolve the marriage finally, irrevocably, and completely. A decree, for example, purporting to be one of divorce, but which forbade either of the divorced persons to marry again, would, in effect, be no more than a decree of judicial separation, which in England merely releases the parties from certain obligations of the marriage-tie without putting an end to the marriage itself. It is, however, not uncommon in some systems of jurisprudence for the court to have power to forbid the guilty party to re-marry. The marriage in such a case is completely dissolved, and the parties resume the status of unmarried persons, although one of them remains under a certain disability. This disability is regarded by the English courts as a penal one, and as such will be regarded as having no operation or effect whatever in this country, and as not extending beyond the limits of the jurisdiction which imposed it (*d*). But a decree which forbids the parties to marry again until the expiration of a certain period from the time on which it is pronounced, imposes no penal disability, but merely postpones the actual date from which the marriage is to be reckoned as dissolved (*e*). A marriage which takes place before that period has elapsed will be regarded in England as a bigamous marriage and therefore void (*f*).

been guilty in connection with the divorce did not necessarily disentitle her to relief, the contract of marriage being on a different footing from other contracts and governed by different principles.

(*s*) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C. A. The test in such a case appears to be the view which the foreign court itself takes of the effectiveness of its own judgment. It must be credited with knowing what irregularities in procedure are fatal to its jurisdiction and what is the correct view of its own law; see *per* RIGBY, L.J., at p. 794.

(*t*) *Shaw* v. *A.-G.* (1870), L. R. 2 P. & D. 156; compare *Colliss* v. *Hector* (1875), L. R. 19 Eq. 334.

(*a*) *Shaw* v. *A.-G.*, *supra*.

(*b*) *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; and compare *Collis* v. *Hector*, *supra*.

(*c*) See *Brinkley* v. *A.-G.* (1890), 15 P. D. 76.

(*d*) *Scott* v. *A.-G.* (1886), 11 P. D. 128.

(*e*) The Indian Divorce Act, No. 4 of 1869, contains such a provision, with the addition that no appeal must have been entered within the period specified (*Warter* v. *Warter* (1890), 59 L. J. (P.) 87).

(*f*) *Warter* v. *Warter*, *supra*.

399. A marriage which a foreign court has purported to dissolve may still be regarded as subsisting in England (*g*).

SUB-SECT. 2.—*Foreign Decrees of Nullity of Marriage.*

Foreign nullity decree.

400. The decree of a foreign court declaring a marriage null and void is not regarded in England as being on the same footing as a decree of dissolution of marriage. The English courts do not look upon it as in the nature of a judgment *in rem* and so conclusive and binding outside the jurisdiction of the court which pronounces it (*h*). The English courts regard residence, and not domicil, as the test of jurisdiction in a nullity suit begun in England (*i*), and further assume jurisdiction in any case to determine the validity of a marriage celebrated in England (*k*); and it would seem that the English courts would concede jurisdiction to the courts of a foreign country on similar principles. But that is a very different thing from regarding a foreign decree of nullity of marriage, when pronounced, to be binding in England on an English court (*l*). Where the question is whether a marriage is formally valid in the country where it was celebrated, the decision of the court of that country that it was invalid would no doubt weigh materially with the English court in dealing with the same question (*m*), but the latter is not necessarily bound by the foreign decision. Similarly, and indeed *à fortiori*, the English courts will not hold themselves bound by the decision of a foreign court declaring null and void a marriage not celebrated within the jurisdiction of that court (*n*). It follows, therefore, that a marriage declared null and void abroad may still hold good in England, and this result cannot be avoided so long as no single

(*g*) *Green* v. *Green*, [1893] P. 89; compare *Simonin* (falsely called *Mallac*) v. *Mallac* (1860), 2 Sw. & Tr. 67. "An honest adherence to this principle" (*i.e.*, that domicil alone gives jurisdiction to divorce) "will preclude the scandal which arises when a man and a woman are held to be man and wife in one country and strangers in another": *per* Lord WATSON in *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, at p. 540. Unfortunately the principle is not universally accepted and the scandal deplored by Lord WATSON still exists. See also the judgment of the Court of Appeal in *Ogden* v. *Ogden*, [1908] P. 46, C. A.; and see note (*k*) on p. 268, *ante*, for the solution suggested in that case for one at least of the scandals.

(*h*) *Sinclair* v. *Sinclair* (1798), 1 Hag. Con. 294. "A sentence of nullity of marriage in the country where the marriage was solemnized would carry with it great authority in this country, but I am not prepared to say that a judgment of a third country on the validity of a marriage not within its territory nor had between subjects of that country would be universally binding": *per* Lord STOWELL, at p. 297.

(*i*) See p. 266, *ante*, and the cases there cited.

(*k*) *Ibid.*

(*l*) *Ogden* v. *Ogden*, *supra*, cited on p. 255, *ante*; *Sinclair* v. *Sinclair*, *supra*; *Simonin* (falsely called *Mallac*) v. *Mallac*, *supra*. But as to foreign decrees of nullity on the ground of physical incapacity, see p. 272, *post*.

(*m*) See *per* Lord STOWELL in *Sinclair* v. *Sinclair*, *supra*. Technically, of course, the English court would approach the question as one of fact only, and would determine, as a fact, whether by the law of the foreign country the marriage was good; but no better evidence could be tendered to prove the fact of validity than a decision on the very point by the foreign court itself. See title EVIDENCE.

(*n*) See *Sinclair* v. *Sinclair*, *supra*; *Ogden* v. *Ogden*, *supra*.

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principle is universally accepted by all countries as a test of what constitutes a valid marriage (*o*).

A decree, nevertheless, of a foreign court declaring a marriage null and void by reason of the physical incapacity of one of the parties (but not otherwise) is (it seems) recognised as valid and binding in this country, if the parties were domiciled in the foreign country (*p*), or if the marriage was celebrated there (*q*).

C. LEGITIMACY.

SECT. 1.—*In General.*

Legitimacy depends on validity of marriage.

401. Legitimacy being a matter of status, it may be necessary, according to circumstances, to discover the legal consequences of that status under different systems of law; and it may happen that the English courts, in the exercise of their own jurisdiction, find themselves compelled to give effect to the legal consequences of a foreign status of legitimacy arising in a manner which English law would not itself recognise at all (*r*).

All persons born in lawful wedlock, no matter where, are legitimate in England. It is obvious that this test of legitimacy may involve the question of the validity of a marriage, and this is a matter which will, of course, be decided by the English courts on the principles already described. Similarly, legitimacy of the children of a second marriage, in cases where the previous marriage has been dissolved by a decree of divorce, will depend in England on the answer to the question whether the divorce was a valid divorce according to English law—that is to say, whether it was pronounced by a competent court of the country where the parties were domiciled (*s*). If the divorce, according to English principles, was invalid, the second marriage will be invalid also, and the children of it illegitimate.* It is in such a case immaterial that the *lex domicilii* of the second husband regards the marriage as good (*a*).

(*o*) *Ogden* v. *Ogden*, [1908] P. 46, C. A.; *Simonin* (falsely called *Mallac*) v. *Mallac* (1860), 2 Sw. & Tr. 67.

(*p*) *Turner* v. *Thompson* (1888), 13 P. D. 37; *per* GORELL BARNES, P., in *Ogden* v. *Ogden*, *supra*, at p. 80. In the former of these cases, the marriage having been dissolved, on the ground of physical incapacity of the husband, by the courts of the domicil, the wife petitioned for a decree of nullity in England, where she had been domiciled at the date of the marriage, and where the marriage was celebrated. It was held that, the marriage having been already dissolved, the English court had no jurisdiction. It is to be noticed that by the law of the domicil the decree took the form of a dissolution of marriage and not a declaration of nullity; but this was said by the President (Sir J. HANNEN) to be a "mere difference in form": *sed quære.* He also pointed out that such a marriage is voidable only in England and not void at the option of the injured party; and, further, that a woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, acquires the domicil of her husband if she lives with him in the country of his domicil. It may, however, be doubted if the *ratio decidendi* would apply to a case where the decree of the foreign court was one of nullity and not of dissolution. *Turner* v. *Thompson*, *supra*, does not seem to have been cited in *Ogden* v. *Ogden*, *supra*.

(*q*) *Per* GORELL BARNES, P., in *Ogden* v. *Ogden*, *supra*, at p. 80.

(*r*) *E.g.*, *per subsequens matrimonium*. See, generally, title BASTARDY, Vol. II., p. 425.

(*s*) See also par. 396, on p. 268, *ante*.

(*a*) *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55. This was the case of the remarriage of a divorced woman, but it has been suggested that the case is

SECT. 2.—*For Purposes of Succession to Real Estate.*

C. Legitimacy. Heirship.

402. The importance attached by English law to the *lex situs* in matters of real estate has led to a very strict view being taken as to the qualifications of a person to succeed as heir *ab intestato* to real property situate in England. An English heir must be legitimate according to English ideas; that is to say, he can only succeed if born in lawful wedlock. It is not enough for him to be legitimate by the law of his domicil, to which the question, as being one of status, would ordinarily be referred by English law (*b*). Thus, a man legitimated *per subsequens matrimonium* cannot inherit English land (*c*); nor, conversely, can he, dying intestate, be succeeded, so far as his real estate is concerned, by anyone except his own children, for English law regards him as related to no one else (*d*). The rule, however, only applies on an intestacy; and a devise of realty by a person legitimate by the law of his domicil, but not born in lawful wedlock, is perfectly good (*e*).

On the same principles, where the *lex situs* recognises legitimacy acquired otherwise than by birth in lawful wedlock, a person legitimate by that law, though not born in lawful wedlock, will be recognised in England as a lawful heir to lands situate in that country (*f*).

It seems that chattels real, being personal property so far as the Statute of Distributions is concerned and devolving, therefore, on an intestacy on the next of kin and not on the heir, do not fall within the scope of this principle (*g*).

different where a man, who has been divorced by a court not competent according to English principles to pronounce a decree, re-marries in the country of his domicil, the courts of which regard his second marriage as valid (Westlake, Private International Law, 4th ed., pp. 96, 97). But if the law of his domicil at the date of the divorce recognises the validity of the second marriage, it must surely follow that it recognises the validity of the divorce, and this would bring the case within the decision in *Armitage* v. *A.-G.* (*Gillig* cited), *Gillig* v. *Gillig*, [1906] P. 135, for which see sect. 2, sub-sect. 1, *supra*; and the rule would be the same for wife as for husband. The principle of *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55, is not affected, for in that case it was the law of the *second* husband's domicil only which recognised the validity of the marriage; and in the eye of the English law the wife, being divorced by an incompetent court, still retained her *first* husband's domicil. For an analogous case see *Re Green, Noyes* v. *Pitkin* (1909), 25 T. L. R. 222.

(*b*) See p. 274, *post*.

(*c*) *Birtwhistle* v. *Vardill* (1840), 7 Cl. & Fin. 895, H. L.

(*d*) *Re Don's Estate* (1857), 27 L. J. (CH.) 98.

(*e*) *Re Grey's Trusts, Grey* v. *Stamford*, [1892] 3 Ch. 88.

(*f*) *Munro* v. *Munro* (1840), 7 Cl. & Fin. 842, H. L.; compare *Munro* v. *Saunders* (1832), 6 Bli. (N. S.) 468, H. L. But see *Fenton* v. *Livingstone* (1859), 5 Jur. (N. S.) 1183, H. L., where the House of Lords decided that a man born of the marriage of his father with a deceased wife's sister could not take Scottish lands by inheritance, the ground of the decision being that such a marriage was in Scotland not only incestuous, but criminal, and that to admit the legitimacy of the child would be repugnant to the principles of Scots law. The marriage had taken place when such marriages were voidable in England, and not void, and were not questionable at all after the death of the husband and wife; but it was decided that they were nevertheless illegal by English law.

(*g*) See Dicey, Conflict of Laws, 2nd ed., pp. 489, 490; Foote, Private International Jurisprudence, 3rd ed., pp. 232, 237. The status of English heirship, but of heirship only, is, in other words, something beyond the status of legitimacy;

C. Legitimacy.

SECT. 3.—*For other Purposes.*

Succession to personal property.

403. Apart from questions of inheritance of real estate, the *lex domicilii* is the test of legitimacy (*h*). In cases where legitimation *per subsequens matrimonium* is in question, English law only recognises the status of legitimacy so acquired, if the father was domiciled in a country by whose laws such legitimation was possible both at the date of the child's birth and at the date of the subsequent marriage (*i*). Both these conditions must be fulfilled, but the place of the marriage and the place of the birth are immaterial (*k*). If by the law of the father's domicil at the date of birth the child was indelibly a bastard, it can never by any subsequent marriage become legitimate (*l*). This is the rule now followed by the English courts in all cases involving succession to property other than real estate, whether the succession takes place by virtue of a will (*m*) or by virtue of the Statute of Distributions (*n*). Legitimacy by the *lex domicilii* is necessary in these cases, and therefore a bequest to the "children" of a foreigner in an English will means to his legitimate children, as understood by the law of his domicil, subject to the rule above stated, that the child at the time of its birth, if not born in lawful wedlock, was not incapable of being legitimated by the *lex domicilii* of its father (*o*).

Similarly, the children of an Englishman domiciled in France (where legitimation *per subsequens matrimonium* is possible) born before marriage, but afterwards legitimated, are not "strangers in blood" to their father within the meaning of the Legacy and Succession Duty Acts (*p*).

On the other hand, the fact that his *lex domicilii* entitles the children of a foreigner, whom he has "acknowledged" before his death, to succeed to his property *ab intestato*, but does not recognise them as fully legitimate, does not make them other than "strangers in blood" in English law for the same purpose (*q*).

it involves birth in lawful wedlock. "The common law . . . requires something more than mere legitimacy to make an heir to real estate in England: it must be legitimacy *sub modo*—legitimacy and being born in wedlock" (*per* Lord BROUGHAM in *Birtwhistle* v. *Vardill* (1840), 7 Cl. & Fin. 895, H. L., at p. 955; compare also *Fenton* v. *Livingstone* (1859), 3 Macq. 497, H. L.).

(*h*) See *per* JAMES, L.J., in *Re Goodman's Trusts* (1881), 17 Ch. D. 266, C. A., at p. 297; and title BASTARDY, Vol. II., p. 425.

(*i*) *Dalhousie* (*Countess*) v. *M'Douall* (1840), 7 Cl. & Fin. 817, H. L.; *Re Wright's Trusts* (1856), 2 K. & J. 595; *Skottowe* v. *Young* (1871), L. R. 11 Eq. 474; *Re Goodman's Trusts* (1881), 17 Ch. D. 266, C. A.; *Re Andros*, *Andros* v. *Andros* (1883), 24 Ch. D. 637; *Re Grove*, *Vaucher* v. *Solicitor to the Treasury* (1888), 40 Ch. D. 216, C. A. *Boyes* v. *Bedale* (1863), 1 Hem. & M. 798, is now overruled; see *Re Goodman's Trusts*, *supra*.

(*k*) *Dalhousie* (*Countess*) v. *M'Douall*, *supra*.

(*l*) *Re Wright's Trusts*, *supra*.

(*m*) *Re Wright's Trusts*, *supra*; *Re Andros*, *Andros* v. *Andros*, *supra*; *Re Grove*, *Vaucher* v. *Solicitor to the Treasury*, *supra*.

(*n*) *Re Goodman's Trusts*, *supra* ("The Statute of Distributions is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in England, and not for any Englishman dying abroad," *per* JAMES, L.J., at p. 300).

(*o*) *Re Andros*, *Andros* v. *Andros*, *supra*.

(*p*) *Skottowe* v. *Young*, *supra*.

(*q*) *Atkinson* v. *Anderson* (1882), 21 Ch. D. 100.

But a bequest to the "next of kin" of a foreigner involves no question of status at all, but only of construction, and means those who are nearest in blood according to English law, subject, of course, to any question of status which may arise (*r*).

SECT. 4.—*Declarations of Legitimacy.*

Legitimacy declarations.

404. Any natural-born British subject, and any person whose right to be deemed a natural-born British subject depends on his legitimacy or on the validity of a marriage, may, if he is domiciled in England or Ireland, or claims real or personal estate situate in England, petition the court for a declaration that he is legitimate or that the marriage is valid, and the decree of the court is in the nature of a judgment *in rem* and binding on all persons (*s*).

In the same circumstances and for the same reasons any person may also petition for a declaration that he is a natural-born British subject (*t*).

The court to which the petition is presented is the Probate, Divorce, and Admiralty Division of the High Court (*a*).

D. ASSIGNMENT OF PROPERTY ON MARRIAGE.

SECT. 1.—*Where there is no Marriage Contract or Settlement.*

SUB-SECT. 1.—*Immovables.*

Effect of marriage on real property.

405. In all matters relating to immovable property the claims of the *lex situs* are paramount (*b*); and in the case of a marriage celebrated in a country where the fact of marriage itself operates as an assignment of all property, whether movable or immovable, of the wife to the husband, it may well be doubted whether land situate in another country would, in such a case, change its ownership unless the proper forms of conveyance required by the law of that country were also complied with (*c*). In the case, however, of marriage in a

(*r*) *Re Fergusson's Will*, [1902] 1 Ch. 483. In this case the next of kin, a sister of the half-blood, would not have succeeded at all by the *lex domicilii*. Compare *Re Wilson's Trusts* (1865), L. R. 1 Eq. 247. Although the question was one of construction (and so for the *lex fori* to decide), and not of status primarily, yet had the next of kin been illegitimate, and so next of kin by blood only, and not by law, and therefore legally no relation to the intestate, a question of status would have been indirectly involved, and she could not of course have succeeded.

(*s*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 1. He may petition for a declaration that the marriage of his parents or grandparents is valid (*ibid.*). The court has no jurisdiction to decide whether the petitioner is heir to real estate to the exclusion of another person, though this can only be decided by proof of the other person's illegitimacy (*Mansel* v. *A.-G.* (1877), 2 P. D. 265; (1879) 4 P. D. 232, C. A.). All persons interested in the suit must be cited, and so given an opportunity to appear; otherwise they are not prejudiced by the decree in any way (s. 8). A decree obtained by fraud or collusion is inoperative (*ibid.*). See further on this subject title BASTARDY, Vol. II., p. 433.

(*t*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 2.

(*a*) In virtue of the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 31, 34. For examples of the exercise of the jurisdiction in respect to marriages celebrated abroad, compare *Scott* v. *A.-G.* (1886), 11 P. D. 128; *Brinkley* v. *A.-G.* (1890), 15 P. D. 76. As to the practice and procedure, see title BASTARDY, Vol. II., p. 433.

(*b*) See also p. 199, *ante*.

(*c*) It has never been suggested in any case that the rule is otherwise than

D. Assignment of Property on Marriage.

country by the law of which marriage, in the absence of express contract, operates to create a community of property between husband and wife, there is authority for saying that lands in England become *ipso facto* on the marriage taking place part of the joint nuptial property, without any further act or conveyance on the part of husband or wife (*d*). But it is conceived that this principle cannot be extended to cases which do not involve a community of goods between the spouses (*e*).

Immovable property accruing to either of the spouses in virtue of the marriage, but at a date subsequent to its celebration, is governed by the same rules, and in no case does the domicil of the parties at any time make any difference. All rights which either of the spouses may have in land or other immovable property in virtue of their marriage are also referred to the *lex situs* (*f*).

SUB-SECT. 2.—*Movables.*

On personal property.

406. Where there is no marriage contract or settlement, the effect of marriage on the movable property of the parties to the marriage is governed by the *lex domicilii* of the husband at the date of the marriage (*g*). This law will decide, for example, whether the marriage operates to transfer to the husband all or only part of the property of the wife (*h*), or to create a community of property between them (*i*). On the same principle, the law of the domicil of the husband during the marriage will be held to govern the rights of either spouse as regards property acquired subsequently to the date of the marriage (*k*), where there is no pre-existing settlement or contract providing for its disposition.

as stated in the text, except, perhaps, in a *dictum* of Lord MEADOWBANK (*Royal Bank of Scotland* v. *Cuthbert* (1813), 1 Rose, 462, p. 481). It is, however, clear from *Selkrig* v. *Davis* (1814), 2 Rose, 97, H. L., that his words must be taken as applying to movables only. See Foote, Private International Jurisprudence, 3rd ed., pp. 230, 231; Westlake, Private International Law, 4th ed., p. 70.

(*d*) See *Re De Nicols, De Nicols* v. *Curlier*, [1900] 2 Ch. 410. In this case KEKEWICH, J., held that the marriage created a partnership in the sense of English law between husband and wife in respect of their property, and that it had been decided in earlier cases that the fact of partnership created a community of property, even in real estate, without the intervention of a conveyance, and that there was no need even for the memorandum or writing required by the Statute of Frauds, 1677 (29 Car. 2, c. 3), ss. 4, 7. But see hereon Lindley on Partnership, 7th ed., pp. 97, 98; and compare Westlake, Private International Law, 4th ed., pp. 73—75. See also title HUSBAND AND WIFE.

(*e*) Compare Westlake, Private International Law, 4th ed., pp. 74, 75. As to the law which the English courts regard as decisive of the question whether any property falls into the category of movables or immovables, see p. 196, *ante*.

(*f*) This follows from the general principle, and has never been questioned in England (Foote, Private International Jurisprudence, 3rd ed., p. 230). Compare *Re James Rea, Rea* v. *Rea*, [1902] 1 I. R. 451.

(*g*) *Re Martin, Loustalan* v. *Loustalan*, [1900] P. 211, C. A., *per* Lord LINDLEY, at p. 233; Dicey, Conflict of Laws, 2nd ed., pp. 639 *et seq.*; Foote, Private International Jurisprudence, 3rd ed., pp. 331, 332.

(*h*) *Royal Bank of Scotland* v. *Cuthbert, supra, per* Lord MEADOWBANK, at p. 481, as explained in *Selkrig* v. *Davis, supra*.

(*i*) *Re De Nicols, De Nicols* v. *Curlier*, [1898] 2 Ch. 60, C. A.; [1900] A. C. 21.

(*k*) *Sawer* v. *Shute* (1792), 1 Anst. 63; *McCormick* v. *Garnett* (1854), 5 De G. M. & G. 278. Where the courts of the domicil have dissolved a marriage, proprietary rights of the spouses *inter se* upon the dissolution are regulated by the *lex domicilii*; *Swaayman* v. *Swaayman* (1908), *Times*, February 17.

SUB-SECT. 3.—*Effect of Change of Domicil after Marriage.*

D. Assignment of Property on Marriage.

Vested rights.

407. A change of domicil subsequent to the date of the marriage will not in any way affect proprietary rights which either spouse may have already acquired in virtue of the marriage itself (*l*). But the rights which the marriage confers must be vested and proprietary rights. A *spes successionis* on an intestacy, for example, is not sufficient (*m*).

SECT. 2.—*Where there is a Marriage Contract or Settlement.*

SUB-SECT. 1.—*Immovables.*

Contracts relating to land.

408. A marriage contract or settlement purporting to deal with land will only be regarded as a valid assignment by English law if conforming to the rules of the *lex situs* (*n*). The same law also will determine the rights which the spouses respectively acquire in the property. It alone will decide, for example, whether a right to dower or to an estate by the curtesy may be claimed in respect of the land assigned (*o*). Such rights may, of course, be abandoned or modified by express stipulations in the contract, but the contract itself, in so far as it is to be operative as a conveyance, must conform to the laws of the *lex situs* which regulate rights in and over land, and will be inoperative in so far as it affects to disregard them (*p*).

Marriage contracts relating to immovables are in fact on precisely the same footing in all respects as other contracts relating to the same subject-matter (*q*).

SUB-SECT. 2.—*Movables.*

Contracts relating to movables.

409. Where there is a marriage contract or settlement executed by the spouses or either of them in respect of movables, the English courts, for the purpose of ascertaining what rights in the settled property are conferred by the contract or settlement, will refer to the law by which the spouses intended that it should be governed (*r*). In the absence of any other indication as to what this intention was,

(*l*) *Re De Nicols, De Nicols* v. *Curlier*, [1898] 2 Ch. 60, C. A.; [1900] A. C. 21. This rule is of importance in questions of succession when either husband or wife has died in the country of the later-acquired domicil, and it is necessary to decide what rights the survivor may have against the estate of the deceased.

(*m*) *Lashley* v. *Hog* (1804), 4 Pat. App. 581, H. L., explained and distinguished in *Re De Nicols, De Nicols* v. *Curlier*, [1900] A. C. 21; see *per* Lord HALSBURY, L.C., at p. 29: "The wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right. . . . The *communio bonorum* in Scotland is a mere fiction." And again, "The French marriage confers not only an implied, but an actual binding partnership proprietary relation, fixed by the law upon the persons of the spouses."

(*n*) Westlake, Private International Law, 4th ed., pp. 75, 76. The assignment, though not operative as a conveyance, may be good as a contract to convey or otherwise deal with the land (*ibid.*).

(*o*) Story, Conflict of Laws, ss. 448, 454, cited by Foote, Private International Jurisprudence, 3rd ed., p. 230. See also *Ilderton* v. *Ilderton* (1793), 2 Hy. Bl. 145; *Re James Rea, Rea* v. *Rea*, [1902] 1 I. R. 451.

(*p*) See Westlake, *ibid.*; Foote, *ibid.*

(*q*) See *Deschamps* v. *Miller*, [1908] 1 Ch. 856.

(*r*) *Anstruther* v. *Adair* (1834), 2 My. & K. 513; *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A.

D. Assignment of Property on Marriage.

it is presumed that the settlement was intended to be governed by the law of the future matrimonial domicil (*s*), which will usually, though not necessarily, be that of the husband at the time of the marriage.

Where law of matrimonial domicil does not apply.

No difficulty can arise in cases where it is expressly stipulated that the law of a particular country shall apply (*t*); but it is often necessary for the court to gather from a consideration of the contract as a whole whether there are sufficient indications of an intention to contract with reference to some other law than that of the matrimonial domicil (*u*). Such indications are the facts that the settlement is in the form prescribed by the law of some other country (*a*); that the property settled, if it is sought to make English law applicable, was English property or within the jurisdiction of the English court (*b*); that there are provisions in the settlement only applicable to a particular system of law (*c*); and, perhaps, that the settlement was entered into before marriage, the marriage subsequently taking place on the faith of it, and the property being situate in a particular country in which it is intended that the matrimonial domicil shall be (*d*).

Rights of creditors in bankruptcy.

The rights of the parties to the marriage contract according to the law of the matrimonial domicil, or the law by which the parties have intended that their contract shall be governed, will not, however, prevail against the rights of creditors, where the husband or wife becomes bankrupt under another jurisdiction. Questions relating to the priority of creditors in a bankruptcy are matters wholly for the *lex fori*, that is, of the country where the bankruptcy occurs (*e*).

(*s*) *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A.; compare also *Feaubert* v. *Turst* (1702), Prec. Ch. 207, 1 Bro. Parl. Cas. 38; *Duncan* v. *Cannan* (1854), 18 Beav. 128. In *Colliss* v. *Hector* (1875), L. R. 19 Eq. 334, although the husband was a domiciled Turk, yet the Court held that the marriage had taken place on his express promise that the matrimonial domicil should be in England, and the settlement was accordingly held to be governed by English law. It might, however, have been equally so held on the ground that the parties intended English law to apply; see *infra*. Compare also *Van Grutten* v. *Digby* (1862), 31 Beav. 561, *per* ROMILLY, M.R.

(*t*) *Guépratte* v. *Young* (1851), 4 De G. & Sm. 217; *Byam* v. *Byam* (1854), 19 Beav. 58.

(*u*) *Re Fitzgerald, Surman* v. *Fitzgerald, supra; Este* v. *Smyth* (1854), 18 Beav. 112.

(*a*) *Anstruther* v. *Adair* (1834), 2 My. & K. 513; *Watts* v. *Shrimpton* (1856), 21 Beav. 97. Compare also *Sawrey-Cookson* v. *Sawrey-Cookson's Trustees* (1905), 8 F. (Ct. of Sess.) 157; *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333.

(*b*) *Van Grutten* v. *Digby, supra, per* ROMILLY, M.R., at p. 569; *Watts* v. *Shrimpton, supra; Re Bankes, Reynolds* v. *Ellis, supra.*

(*c*) *Sawrey-Cookson* v. *Sawrey-Cookson's Trustees, supra.*

(*d*) *Colliss* v. *Hector, supra; Van Grutten* v. *Digby, supra;* Foote, Private International Jurisprudence, 3rd ed., pp. 335, 336.

(*e*) *Thurburn* v. *Steward* (1871), L. R. 3 P. C. 478 (bankruptcy in Cape Colony, where the claims of wives under marriage settlements were postponed to those of all other creditors); *Re Melbourn, Ex parte Melbourn* (1870), 6 Ch. App. 64 (marriage contract by persons domiciled in Batavia invalid as against third parties under the local law by reason of non-registration; the wife held to be entitled to prove in her husband's bankruptcy in England for moneys settled upon her, the non-registration not vitiating the contract *ab initio*, but only affecting the remedy of persons claiming under it).

SUB-SECT. 3.—*Form of Contract and Capacity to contract.*

D. Assignment of Property on Marriage.

Capacity to contract.

410. The capacity of the parties to enter into a marriage contract before marriage is governed by the law of their respective domicils (*f*). Thus, the capacity of an infant to enter into a marriage settlement must be referred to his or her *lex domicilii* at the date of the contract (*g*), and to that law must be referred the question whether, as regards the infant, the settlement is voidable or void (*h*). It seems also that the capacity to affirm or repudiate a settlement is to be referred to the law of the domicil which the infant, if a female, acquires on marriage, and that, if that law recognises no such right, no question of affirmation or repudiation can afterwards arise in England (*i*).

Capacity to enter into contracts after marriage, under or in virtue of a previous marriage settlement, is clearly governed by the law applicable to the marriage settlement itself, whatever that may be (*k*).

Form of marriage contracts.

411. The form of the marriage contract will be governed by the *lex loci contractus*, in accordance with the general principles of private international law relating to contracts (*l*), unless, perhaps, the intention of the parties is clearly to adopt some other law, as, for example, the law of their domicil or the law of the country where the property is situate (*m*). The question is one of importance, as the contract may be valid by the forms of one country, but invalid by those of another (*n*).

SUB-SECT. 4.—*Interpretation of Contract.*

Interpretation of marriage settlement.

412. In the absence of all other circumstances, it would appear that the *lex loci contractus* is primarily to be referred to for the

(*f*) *Guépratte* v. *Young* (1851), 4 De G. & Sm. 217; *Re Cooke's Trusts* (1887), 56 L. J. (CH.) 637; *Cooper* v. *Cooper* (1888), 13 App. Cas. 88; *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87, C. A.; compare *Sawrey-Cookson* v. *Sawrey-Cookson's Trustees* (1905), 8 F. (Ct. of Sess.) 157. See p. 234, *ante*; and, generally, title CONTRACT.

(*g*) *Re Cooke's Trusts*, *supra*; *Viditz* v. *O'Hagan*, *supra*.

(*h*) Compare *Edwards* v. *Carter*, [1893] A. C. 360; *Duncan* v. *Dixon* (1890), 44 Ch. D. 211. See title INFANTS AND CHILDREN.

(*i*) *Viditz* v. *O'Hagan*, *supra*; Westlake, Private International Law, 4th ed., pp. 44, 45. Foote, however, suggests that in such a case no question of *capacity* is raised at all, but rather of *rights* in relation to the settled property, which would properly be referred to the law of the matrimonial domicil, as being presumably, in the absence of express contract, the law which the parties intended should govern the settlement (Private International Jurisprudence, 3rd ed., pp. 76, 77). But COLLINS, L.J. (*Viditz* v. *O'Hagan*, *supra*, at p. 100), says: "The condition is a mere incident of status, and has no application when the status is changed." See also *Sawrey-Cookson* v. *Sawrey-Cookson's Trustees*, *supra*.

(*k*) *Guépratte* v. *Young*, *supra* (contract in England in virtue of a marriage settlement adopting French law); *Pouey* v. *Hordern*, [1900] 1 Ch. 492; *Re Mégret*, *Tweedie* v. *Maunder*, [1901] 1 Ch. 547 (power of appointment under a settlement governed by English law, the exercise of which would not have been possible by the law of the matrimonial domicil).

(*l*) See p. 236, *ante*; compare *Guépratte* v. *Young*, *supra*.

(*m*) *Van Grutten* v. *Digby* (1862), 31 Beav. 561 (contract relating to property situate in England held good, though invalid by the *lex loci contractus*). Compare *Sawrey-Cookson* v. *Sawrey-Cookson's Trustees*, *supra*; *Re Bankes*, *Reynolds* v. *Ellis*, [1902] 2 Ch. 333; *Re Barnard*, *Barnard* v. *White* (1887), 56 L. T. 9; Westlake, Private International Law, 4th ed., pp. 77, 78.

(*n*) As in *Van Grutten* v. *Digby*, *supra*.

D. Assignment of Property on Marriage.

interpretation of a marriage settlement (*o*); but the manifest intention of the parties may indicate a preference for another law (*p*). In construing ambiguous or technical expressions, the law of the domicil may be taken into consideration (*q*), and, generally, it may be said that if the parties have clearly contracted with reference to a particular law, the English courts will interpret the contract according to the canons which it is to be presumed they have chosen (*r*).

SUB-SECT. 5.—*Variation of Marriage Settlements.*

Varying settlements on divorce.

413. The English courts have jurisdiction (*s*) to vary a settlement on the occasion of an English decree of divorce, even though the settlement was made with reference to a foreign law (*t*), and though at the date of the settlement the parties were domiciled out of England (*a*). But the English courts have no jurisdiction to vary where the decree has been pronounced by a foreign court (*b*).

E. RIGHTS OF SPOUSES INTER SE AND IN RESPECT OF THEIR CHILDREN.

Authority of husband over wife.

414. The authority of a husband over his wife is a matter wholly for the law of the country where the parties are resident for the time being. No English court would recognise rights conferred by the law of a husband's domicil or nationality, if such rights conflicted with those of English law (*c*).

Of parents over child.

The authority of parents over children is also governed by the law of the country where the parties are resident (*d*). Similarly, the rights of a parent in or over the movable property of an infant are governed in the view of English law by the law of the country where the parent is resident (*e*).

(*o*) *Lansdowne* (*Marchioness*) v. *Lansdowne* (*Marquis*) (1820), 2 Bli., 60, H. L.; Foote, Private International Jurisprudence, 3rd ed., p. 333, citing Story, Conflict of Laws, s. 276. See also pp. 232 *et seq.*, *ante*.

(*p*) Westlake, Private International Law, 4th ed., pp. 79, 80.

(*q*) *Lansdowne* (*Marchioness*) v. *Lansdowne* (*Marquis*), *supra*.

(*r*) There appear to be divergent views on the matter, and there is an absence of modern authority directly in point. Story's view (*ubi supra*) is probably not that which would now be followed by the English courts, at any rate not without considerable qualifications (Westlake, Private International Law, 4th ed., p. 80).

(*s*) By the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5; *Nunnely* v. *Nunnely and Marrian* (1890), 15 P. D. 186.

(*t*) *Nunnely* v. *Nunnely and Marrian*, *supra*.

(*a*) *Forsyth* v. *Forsyth*, [1891] P. 363. For a case of variation of settlements under a separation deed, the settlement being expressed to be governed by French law, see *De Ricci* v. *De Ricci*, [1891] P. 378.

(*b*) *Moore* (otherwise *Bull*) v. *Bull*, [1891] P. 279. This was a case of a decree of nullity, but it is clear that the case of a decree of divorce would be on the same footing.

(*c*) Dicey, Conflict of Laws, 2nd ed., p. 472. Petitions for judicial separation or for restitution of conjugal rights in which residence alone, apart from domicil, gives the English courts jurisdiction, are examples of the principle. See p. 264, *ante*.

(*d*) *Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, at p. 114, H. L.: "The law of this country regulates the authority of the parent of a foreign child living in England by the laws of England, and not by the laws of the country to which the child belongs." See title INFANTS AND CHILDREN.

(*e*) *Gambier* v. *Gambier* (1835), 7 Sim. 263. Dicey, Conflict of Laws, 2nd ed.,

E. Rights of Spouses inter se and in respect of their Children.

Rights of guardians.

415. The rights of a guardian appointed in virtue of the law of a foreign country are governed by the law of the country where the ward is resident; and though the English courts may recognise the foreign guardian, they will only give effect to his rights so long as they do not conflict with English law (*f*). In any event, the English courts have a complete discretion in such cases, and the foreign guardian can claim no authority as of right. But the courts will not usually interfere with the foreign guardian's authority (*g*).

Succession on death.

416. Rights of succession of one spouse on the death of the other are governed by the *lex domicilii* of the deceased spouse at the date of death, in so far as they are not excluded by an express or implied contract between the spouses (*h*).

Part X.—Foreign Judgments.

SECT. 1.—*Foreign Judgments in Personam as Causes of Action.*

Actions on foreign judgments.

417. Subject to certain qualifications referred to below, the judgment *in personam* of a foreign court of competent jurisdiction may be sued upon in England (*i*). The English courts will not directly enforce a foreign judgment by execution or any other process, but they will regard the judgment as creating a debt between the parties to it (*k*). The debt so created is a simple contract debt and not a specialty debt (*l*), the liability of the defendant arising on an implied contract to pay the amount of the foreign judgment (*m*), and the Statutes of Limitation applicable in England to a simple contract debt may be pleaded as a defence to such an action (*n*).

p. 474, points out that in this case the parent was domiciled as well as resident in England, but that the judgment seems to lay stress rather on the fact of residence. Immovables, of course, are governed by the *lex situs*.

(*f*) *Stuart* v. *Bute* (*Marquis*) (1861), 9 H. L. Cas. 440; *Nugent* v. *Vetzera* (1866), L. R. 2 Eq. 704. See *Johnstone* v. *Beattie* (1843), 10 Cl. & Fin. 42, at p. 113, H. L.

(*g*) *Nugent* v. *Vetzera*, *supra*.

(*h*) Dicey, Conflict of Laws, 2nd ed., p. 643; Westlake, Private International Law, 4th ed., p. 81. Compare *Lashley* v. *Hog* (1804), 4 Pat. App. 581; *Re De Nichols*, *De Nichols* v. *Curlier*, [1900] A. C. 21. Compare *Re James Rea*, *Rea* v. *Rea*, [1902] 1 I. R. 451.

(*i*) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C. A. The court must be a judicial court; see *Robinson* v. *Bland* (1760), 2 Burr. 1077 (court of honour); *Gage* v. *Bulkley* (1744), 3 Atk. 214 (political court); and compare *Waldron* v. *Coombe* (1810), 3 Taunt. 162. For the qualifications, see p. 283, *post*.

(*k*) *Walker* v. *Witter* (1778), 1 Doug. (K. B.) 1; *Russell* v. *Smyth* (1842), 9 M. & W. 810; *Grant* v. *Easton* (1883), 13 Q. B. D. 302, C. A.

(*l*) *Dupleix* v. *De Roven* (1705), 2 Vern. 540; *Walker* v. *Witter*, *supra*; *Grant* v. *Easton*, *supra*.

(*m*) See *per* Lord ESHER, M.R., in *Grant* v. *Easton*, *supra*, at p. 303. The plaintiff in England must be the successful plaintiff abroad or his assignee; see *Barber* v. *Mexican Land and Colonization Co., Ltd.* (1899), 16 T. L. R. 127, where an American court had by order authorised the plaintiff to sue on the American judgment in the name of the company which had obtained the judgment in any other court. It was held that this order was *ultra vires* so far as authorisation of the English proceedings was concerned.

(*n*) See *Bouchet* v. *Tulledge* (1894), 11 T. L. R. 87. But where proceedings have been taken abroad on an English judgment and the judgment of the foreign court pronounced thereon has been satisfied by payment, though not to the full amount of the original judgment, such payment is not on account of

SECT. 1. Foreign Judgments in Personam as Causes of Action.

The judgment creates a debt available for other purposes than as a cause of action, and is, for example, enforceable against assets in the administration of an intestate's estate without further action (*o*). But a foreign judgment *in personam* cannot be enforced by proceedings *in rem* in England (*p*).

No merger.

Since the foreign judgment constitutes a simple contract debt only, there is no merger of the original cause of action, and it is therefore open to the plaintiff to sue either on the foreign judgment or on the original cause of action on which it is based (*q*), unless the foreign judgment has been satisfied (*r*).

Special indorsement.

An action on a foreign judgment may be the subject of a specially indorsed writ (*s*).

What foreign judgments may be enforced.

418. The judgment which it is sought to enforce, whether by action or otherwise, must be, as between the parties to it, final, conclusive and complete in the courts of the country where it is pronounced (*t*). A judgment is not final and conclusive if the same court which pronounces it has power to rescind or vary it subsequently (*u*); but a judgment otherwise final is not the less so because it may be the subject of an appeal to a higher court, although if proceedings be taken in England during the pending of the appeal, this may be ground for the English court to stay proceedings until the appeal is determined (*a*); but it will be no bar to an action on the judgment (*b*). No judgment, therefore, of a foreign court in proceedings of an "executive" nature, in which the defendant is precluded from raising all available defences, and which may be rendered null and void by subsequent "plenary" proceedings (*c*), no interlocutory order for payment of money into court (*d*), no order for payment of costs to one party on his undertaking to repay them in the event of his failing upon appeal (*e*), and no interlocutory and collateral order for payment

the original judgment so as to take the case out of the English Statute of Limitations in the event of further proceedings in England to recover the balance (*Taylor* v. *Hollard*, [1902] 1 K. B. 676). See also title LIMITATION OF ACTIONS.

(*o*) *Dupleix* v. *De Roven* (1705), 2 Vern. 540.

(*p*) *The City of Mecca* (1881), 6 P. D. 106, C. A. But a foreign judgment *in personam* may be a bar to further proceedings in England by the unsuccessful party (*The Griefswald* (1859), Sw. 430).

(*q*) *Hall* v. *Odber* (1809), 11 East, 118; *Smith* v. *Nicholls* (1839), 5 Bing. (N. C.) 208; *Bank of Australasia* v. *Harding* (1850), 9 C. B. 661; *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717; *Kelsall* v. *Marshall* (1856), 1 C. B. (N. S.) 241; *Thompson* v. *Bell* (1854), 3 E. & B. 236.

(*r*) *Barber* v. *Lamb* (1860), 8 C. B. (N. S.) 95; *Taylor* v. *Hollard*, [1902] 1 K. B. 676; and see p. 290, *post*.

(*s*) *Grant* v. *Easton* (1883), 13 Q. B. D. 302, C. A.; compare *Codd* v. *Delap* (1905), 92 L. T. 510, H. L.

(*t*) *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1; see also *Plummer* v. *Woodburne* (1825), 4 B. & C. 625; *Patrick* v. *Shedden* (1853), 2 E. & B. 14; *Frayes* v. *Worms* (1861), 10 C. B. (N. S.) 149. So also, where a foreign judgment is pronounced as by confession, the confession must be properly proved (*Frankland* v. *M'Gusty* (1830), 1 Knapp, 274, P. C.).

(*u*) *Nouvion* v. *Freeman*, *supra*; *Patrick* v. *Shedden*, *supra*.

(*a*) *Alivon* v. *Furnival* (1834), 1 Cr. M. & R. 277; *Scott* v. *Pilkington* (1862), 2 B. & S. 11.

(*b*) *Ibid.*

(*c*) *Nouvion* v. *Freeman*, *supra* (Spanish "remate" judgment).

(*d*) *Paul* v. *Roy* (1852), 15 Beav. 433.

(*e*) *Patrick* v. *Shedden* *supra*.

of costs (*f*), will be enforced by the English courts. But where the order for payment of costs is part of the final decree of the foreign court which disposes of the whole matter in dispute, the judgment is enforceable in England (*g*); as, for example, an order for the payment of costs by the co-respondent in a decree of divorce (*h*).

The foreign judgment must be for a sum certain (*i*). Thus, an order for the payment of costs is not enforceable until the costs have been taxed (*k*); but it is immaterial that the foreign court has stayed execution on the judgment to enable the defendant to prove a counterclaim, if any (*l*).

The decree in equity of a foreign court can be sued upon in England, provided it orders the payment of an ascertained sum by one party to the other (*m*); as, for example, a balance due on a dissolution of partnership (*n*), or in connection with a trust or an executorship (*o*).

SECT. 2.—*When Foreign Judgments are not Enforceable.*

When foreign judgments cannot be enforced.

419. There are, however, certain qualifications to the rule that a judgment obtained in a foreign country will support an action in England as for a simple debt. The foreign judgment may either be one of a kind which the policy of the English law refuses to enforce, though otherwise good and valid; or one obtained in such circumstances that English law refuses to regard it as possessing any extra-territorial and international validity, though unobjectionable by the *lex loci;* or, lastly, one to which by reason of fraud on the part of the successful litigant and on general considerations of natural justice the English courts will attach no legal rights or obligations whatsoever.

SUB-SECT. 1.—*As contrary to the Policy of English Law.*

Against policy.

420. In no circumstances will an action lie in England on a foreign judgment pronounced in an action of a penal nature, for no country enforces the penal laws of another country (*p*). In such a case the English court will itself decide whether the original action

(*f*) *Sheehy* v. *Professional Life Assurance Co.* (1857), 2 C. B. (N. S.) 211.
(*g*) *Russell* v. *Smyth* (1842), 9 M. & W. 810.
(*h*) *Ibid.*
(*i*) *Sadler* v. *Robins* (1808), 1 Camp. 253; *Hall* v. *Odber* (1809), 11 East, 118; *Henley* v. *Soper* (1828), 8 B. & C. 16; *Henderson* v. *Henderson* (1844), 6 Q. B. 288.
(*k*) *Sadler* v. *Robins, supra.*
(*l*) *Hall* v. *Odber, supra.*
(*m*) *Sadler* v. *Robins, supra; Henley* v. *Soper, supra; Henderson* v. *Henderson, supra.*
(*n*) *Henley* v. *Soper, supra.*
(*o*) *Henderson* v. *Henderson, supra.*
(*p*) *Huntington* v. *Attrill*, [1893] A. C. 150. "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenues or other municipal laws, and to all judgments for such penalties" (*per curiam* in *Wisconsin* v. *Pelican Co.* (1888), 127 U. S. (20 Davis) 265, at p. 290, cited in *Huntington* v. *Attrill, supra*, at p. 157).

SECT. 2. When Foreign Judgments are not Enforceable.

was penal or not, and will not be bound by the view adopted by the foreign court pronouncing the judgment (*q*).

Nor will the English courts pay regard to foreign judgments creating a status of a penal nature, or at any rate of a kind not recognised in England (*r*); and probably will not entertain an action on a judgment obtained abroad for the purpose of enforcing the revenue laws of a foreign State (*s*).

It is apprehended, also, that no action will lie where the foreign judgment sued upon was in respect of a cause of action which would not be entertained in England because against public policy or for some similar reason (*t*).

SUB-SECT. 2.—*Foreign Court without Jurisdiction.*

Essentials to enforcement of foreign judgments.

421. It is necessary to distinguish between foreign judgments both valid by the *lex loci* and recognised in England as giving rise to a cause of action and foreign judgments valid by the *lex loci* but not satisfying those requirements which are demanded by English law before it will grant recognition to the foreign judgment as possessing unquestionable international validity as well as being valid by its own local law (*a*). A foreign country, having exclusive jurisdiction within the limits of its own territory, can permit the presence or absence of any circumstance or preliminary that it thinks fit in defining the terms on which its courts may assume jurisdiction and pronounce valid judgments (*b*). But it cannot lay down rules for the rest of the world (*c*); and other countries are not compelled to recognise its judgments as creating obligations which their own courts must enforce, unless such judgments fulfil the conditions which the comity of nations demands before an international validity can be asserted.

Defendant a subject of the foreign state.

422. These conditions, at least one of which is required by English law to be satisfied in such cases, are as follows: First, that the defendant should be a subject of the foreign country (*d*); for every

(*q*) *Huntington* v. *Attrill*, [1893] A.C. 150.

(*r*) *Re Selot's Trusts*, [1902] 1 Ch. 488 (French "prodigue"), following *Worms* v. *de Valdor* (1880), 49 L. J. (CH.) 261.

(*s*) *Sydney Municipal Council* v. *Bull*, [1909] 1 K. B. 7. Though this was not an action on a judgment, but one directly to enforce a rate imposed by a foreign corporation, the principle must be the same (see note (*t*), *infra*).

(*t*) See Dicey, Conflict of Laws, 2nd ed., pp. 914, 915; Piggott, Foreign Judgments, 2nd ed., pp. 176, 177. In *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351, the decision was on another ground; but it is difficult to see any distinction between actions in this country on contracts good by the *lex loci contractus*, but void in England, and actions on judgments obtained in respect of the same contracts in the foreign country which recognises them. See *Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A.; *Kaufman* v. *Gerson*, [1904] 1 K. B. 591, C. A.; and see title CONTRACT.

(*a*) See the classification of foreign judgments by WRIGHT, J., in *Turnbull* v. *T. W. & J. Walker* (1892), 67 L. T. 767.

(*b*) See *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670; *Turnbull* v. *T. W. & J. Walker*, *supra*.

(*c*) See *per* Lord ELLENBOROUGH in *Buchanan* v. *Rucker* (1808), 9 East, 192, at p. 194.

(*d*) *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351, at p. 371; *Emanuel* v. *Symon*, [1908] 1 K. B. 302, C. A., *per* BUCKLEY, L.J., at p. 309. Compare *Douglas* v.

SECT. 2. When Foreign Judgments are not Enforceable.

person owes allegiance to the country of which he is a subject, and is therefore under an obligation to comply with the judgments of the courts of that country (*e*).

Resident therein.

Secondly, that the defendant was resident in the foreign country at the time when the action was begun against him (*f*). The jurisdiction of every country is coterminous with its territory, and every person resident therein owes at least a temporary allegiance during the period of his residence (*g*). It is not a sufficient objection that the defendant was served with process while only temporarily present in the foreign country, and that he left immediately afterwards (*h*).

Defendant must have selected the forum.

Thirdly, that the defendant in his capacity as plaintiff in the foreign action himself selected the forum where the action was heard (*i*).

Defendant must have appeared voluntarily.

Fourthly, that the defendant voluntarily appeared (*k*). But the appearance must be in fact voluntary; and therefore, where a foreign court has seized property of the defendant, and he afterwards appears in order to release or protect it, this is not a voluntary appearance, but in the nature of an appearance under duress (*l*). Had he, however, appeared before the property was seized, although he only did so to protect it from future seizure, his appearance would have been a voluntary one (*m*). An appearance under protest is none the less a voluntary appearance (*n*).

Defendant must have agreed to submit to the foreign jurisdiction.

Fifthly, that the defendant has contracted to submit to the jurisdiction of the foreign court (*o*). Thus, where a shareholder in a foreign company was bound by the memorandum of association of the company, which declared his domicil to be in a certain place in default of his selecting another, the foreign court was held to

Forrest (1828), 4 Bing. 686, *per* BEST, C.J., at p. 703; *General Steam Navigation Co.* v. *Guillou* (1843), 11 M. & W. 877, at p. 894.

(*e*) *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351; *Emanuel* v. *Symon*, [1908] 1 K. B. 302, C. A. These conditions are neither cumulative, nor, strictly speaking, alternative, but, according to the circumstances, the defendant must come within one of them.

(*f*) *Rousillon* v. *Rousillon*, *supra*; *Emanuel* v. *Symon*, *supra*; *Cavan* v. *Stewart* (1816), 1 Stark. 525; *Schibsby* v. *Westenholz* (1870), L. R. 6 Q. B. 155; *Turnbull* v. *T. W. & J. Walker* (1892), 67 L. T. 767; *Carrick* v. *Hancock* (1895), 12 T. L. R. 59; *Jaffer* v. *Williams* (1908), 25 T. L. R. 12.

(*g*) Compare *Calvin's Case* (1608), 7 Co. Rep. 18 a.

(*h*) See *Carrick* v. *Hancock*, *supra*.

(*i*) *Rousillon* v. *Rousillon*, *supra*; *Emanuel* v. *Symon*, *supra*; *General Steam Navigation Co.* v. *Guillou*, *supra*, at p. 894: "They [the defendants] did not select the tribunal and sue as plaintiffs, in which case the determination might possibly have bound them" (*per* PARKE, B., cited by BLACKBURN, J., in *Schibsby* v. *Westenholz*, *supra*, at p. 161).

(*k*) *Rousillon* v. *Rousillon*, *supra*; *Emanuel* v. *Symon*, *supra*; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670; *De Cosse Brissac* v. *Rathbone* (1861), 6 H. & N. 301; *The Challenge*, [1904] P. 41. In *Malony* v. *Gibbons* (1810), 2 Camp. 502, the defendant appeared by a foreign attorney, but put in no defence. *Held*, that the judgment so obtained was enforceable in England.

(*l*) *Voinet* v. *Barrett* (1885), 55 L. J. (Q. B.) 39, C. A.

(*m*) *Ibid.*; *Gaboriau* v. *Maxwell* (1908), *Times*, December 10.

(*n*) *Boissière & Co.* v. *Brockner & Co.* (1889), 6 T. L. R. 85.

(*o*) *Rousillon* v. *Rousillon*, *supra*; *Emanuel* v. *Symon*, *supra*; *Vallée* v. *Dumergue* (1849), 4 Exch. 290; *Copin* v. *Adamson* (1874), L. R. 9 Exch. 345; *Feyericks* v. *Hubbard* (1902), 71 L. J. (K. B.) 509.

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have jurisdiction, and its judgment was enforceable in England against the defendant at the suit of the company (*p*). But there must be a clear contract, express or implied, to elect a particular domicil. The mere fact, as in the example referred to, that the foreign law contained similar provisions to those in the memorandum of association, would be insufficient to give the foreign court jurisdiction apart from the memorandum itself (*q*). Nor will a foreign judgment be enforced in England, where, by the law governing the contract sued upon in the foreign country, the defendant is deemed to have elected a domicil in that country (*r*).

Possession of property not sufficient.

Neither the possession by the defendant of property real or personal, nor the existence of a partnership of which the defendant is a member, in the foreign country, can any longer be considered as giving jurisdiction, in the absence of any other circumstances, to the courts of that country, so as to make their judgments enforceable in England (*s*).

Defendant must have notice of the proceedings.

423. It follows, *à fortiori* from what has been said above, that a foreign judgment obtained in an action in which the defendant had no notice of the proceedings cannot be sued upon in England (*t*); and it makes no difference, if the defendant did not appear, that he received notice of the proceedings in time to allow him to proceed to the foreign country and defend them had he wished to do so (*a*). It is also immaterial that by the law of the foreign country there may, in the absence of the defendant, be good constructive service of process, as by advertisement (*b*); but cases may arise where a defendant is regarded as constructively present in the foreign country by virtue of holding a public office there, in which case personal service of process upon him will perhaps be dispensed with (*c*).

Action against shareholder in foreign company.

424. It is apprehended that no action will lie on a foreign judgment obtained against a defendant who is merely domiciled in

(*p*) *Copin* v. *Adamson* (1874), L. R. 9 Exch. 345; compare *Vallée* v. *Dumergue* (1849), 4 Exch. 290.

(*q*) See *Copin* v. *Adamson, supra.*

(*r*) *Meeus* v. *Thellusson* (1853), 8 Exch. 638. The doubt felt by Westlake, Private International Law, 4th ed., p. 371, on this point is, it is apprehended, removed by the decision of the Court of Appeal in *Emanuel* v. *Symon*, [1908] 1 K. B. 302, C. A. Compare also *Turnbull* v. *T. W. & J. Walker* (1892), 67 L. T. 767.

(*s*) *Emanuel* v. *Symon, supra;* compare *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670. *Douglas* v. *Forrest* (1828), 4 Bing. 686, and *Cowan* v. *Braidwood* (1840), 1 Man. & G. 882, are no longer law on this point, and the doubts expressed in *Schibsby* v. *Westenholz* (1870), L. R. 6 Q. B. 155, and *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351, are justified.

(*t*) *Buchanan* v. *Rucker* (1807), 1 Camp. 63, (1808) 9 East, 192; *Cavan* v. *Stewart* (1816), 1 Stark. 525; *Douglas* v. *Forrest, supra;* and *Cowan* v. *Braidwood, supra*, cannot now be supported. See also *The Duc d'Aumale*, [1903] P. 18, *per* MATHEW, L.J., at p. 24, C. A.

(*a*) *Schibsby* v. *Westenholz, supra; Turnbull* v. *T. W. & J. Walker, supra. Reynolds* v. *Fenton* (1846), 3 C. B. 187, is clearly overruled.

(*b*) *Buchanan* v. *Rucker, supra.*

(*c*) This is now the generally accepted explanation of *Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951, a decision said to "go to the verge of the law" in *Don* v. *Lippmann* (1837), 5 Cl. & Fin. 1, H. L., *per* Lord BROUGHAM, and which was not followed in *Emanuel* v. *Symon, supra.* See also *Schibsby* v. *Westenholz, supra; Sirdar Gurdyal Singh* v. *Rajah of Faridkote, supra.*

SECT. 2. When Foreign Judgments are not Enforceable.

the foreign country, unless one or more of the conditions described above are also fulfilled (*d*). But an action may be brought in England on a foreign judgment against a shareholder in a company domiciled in the foreign country, when by the foreign law the proper officer of the company may be sued as representing the company and the judgment afterwards executed against the shareholders individually (*e*).

Want of jurisdiction in foreign court.

425. A foreign court may not be the proper court by the law of the foreign country to try a particular action, but such want of jurisdiction is a matter which should be pleaded in the foreign proceedings, and forms no answer to a subsequent action in England on the judgment so obtained (*f*).

SUB-SECT. 3.—*Judgments improperly obtained.*

Judgment obtained by fraud etc.

426. Though every presumption is to be made in favour of a foreign judgment, and the burden of proof lies on him who impeaches it (*g*), yet, since no one is entitled to take advantage of his own wrong, a foreign judgment obtained by fraud or misrepresentation cannot be enforced in an English court (*h*). The fraud alleged as a ground for disregarding the judgment may have been discovered since the judgment was pronounced (*i*), or it may actually have been the subject of investigation by the foreign court, which perhaps has decided that no fraud was committed (*k*); nevertheless in either case the judgment will have no effect in England (*l*). In an action on a foreign judgment, therefore, the

(*d*) See Dicey, Conflict of Laws, 2nd ed., pp. 368 *et seq.* Westlake, Private International Law, 4th ed., pp. 371 *et seq.*, seems to take a different view. He points out (p. 373) that the "allegiance" referred to in the judgment in *Douglas* v. *Forrest* (1828), 4 Bing. 686, probably means "domicil." "Domicil" is also referred to in *Cowan* v. *Braidwood* (1840), 1 Man. & G. 882, but there is an absence of direct modern authority. See, however, *Emanuel* v. *Symon*, [1908] 1 K. B. 302, at p. 309, and *Jaffer* v. *Williams* (1908), 25 T. L. R. 12.

(*e*) *Bank of Australasia* v. *Harding* (1850), 9 C. B. 661; *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717.

(*f*) *Vanquelin* v. *Bouard* (1863), 15 C. B. (N. S.) 341.

(*g*) *Henderson* v. *Henderson* (1844), 6 Q. B. 288; *Robertson* v. *Struth* (1844), 5 Q. B. 941: "We presume the judgment of a foreign court is correct" (*per* PATTESON, J., at p. 942); compare *Taylor* v. *Ford* (1873), 22 W. R. 47; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C. A., *per* LINDLEY, M.R., at p. 792.

(*h*) *Ochsenbein* v. *Papelier* (1873), 8 Ch. App. 695: "It was never doubted that a foreign judgment could be impeached for fraud" (*per* MELLISH, L.J., at p. 700); *Abouloff* v. *Oppenheimer & Co.* (1882), 10 Q. B. D. 295, C. A.; *Manger* v. *Cash* (1889), 5 T. L. R. 271; *Vadala* v. *Lawes* (1890), 25 Q. B. D. 310, C. A.: "The rule . . . is perfectly well established and known that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English court or of a foreign court does not matter" (*per* LINDLEY, L.J., at p. 316). Compare *Kingston's (Duchess) Case* (1776), 2 Smith, L. C., 11th ed., 791; *Sinclair* v. *Fraser* (1771), 1 Doug. (K. B.) 4 a, note; *Bowles* v. *Orr* (1835), 1 Y. & C. (EX.) 464; *Price* v. *Dewhurst* (1837), 8 Sim. 279, *per* SHADWELL, V.-C., at pp. 302, 303. See also *Cammell* v. *Sewell* (1858), 3 H. & N. 617, at p. 646; *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717, at p. 735; *Godard* v. *Gray* (1870), L. R. 6 Q. B. 139, at p. 149; *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, at p. 433.

(*i*) As, for example, in *Manger* v. *Cash*, *supra*.

(*k*) *Abouloff* v. *Oppenheimer & Co.*, *supra*.

(*l*) *Ibid.* "Where a fraud has been successfully perpetrated for the purpose of obtaining the judgment of a court, it seems to me fallacious to say that

SECT. 2. When Foreign Judgments are not Enforceable.

defendant may raise the defence of fraud, even though his defence involves the retrial of the matters adjudicated on by the foreign court (*m*).

It is apprehended that fraud on the part of the court itself would equally invalidate its judgment (*n*).

SUB-SECT. 4.—*Foreign Proceedings contrary to Natural Justice.*

Vitiated judgments.

427. When the proceedings of the foreign court are contrary to natural justice, the judgment in which such proceedings result will be disregarded in England (*o*). The expression is used rather with reference to the form of procedure adopted than to the merits of the particular case (*p*). Substantial injustice according to English notions must be proved; but proceedings are not necessarily contrary to natural justice because they differ from the English practice (*q*). A judgment which totally disregards the comity of nations (*r*), or which knowingly and perversely disregards the rights given to an English subject by English law (*s*), will (probably) be held to be of no effect in England (*t*). Mere irregularity of procedure, however, and nothing more, on the part of the foreign court will not be regarded as vitiating its proceedings (*a*).

Irregularity not enough.

because the foreign court believes what at the moment it has no means of knowing to be false, the court is mistaken, and not misled; it is plain that if it had been proved before the foreign court that fraud had been perpetrated with the view of obtaining its decision, the judgment would have been different from what it was" (*per* Lord COLERIDGE, C.J., at p. 303).

(*m*) *Vadala* v. *Lawes* (1890), 25 Q. B. D. 310, following *Abouloff* v. *Oppenheimer & Co.* (1882), 10 Q. B. D. 295, C. A.

(*n*) See *Price* v. *Dewhurst* (1837), 8 Sim. 279, where the foreign court was constituted of persons interested in the subject-matter of the action, who found in their own favour.

(*o*) *Price* v. *Dewhurst, supra; Henderson* v. *Henderson* (1844), 6 Q. B. 288, *per* Lord DENMAN, at p. 298: "This [*i.e.*, that the defendant has not had justice done him in the foreign court] is never to be presumed, but the contrary principle holds, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, is repugnant to natural justice"; *Crawley* v. *Isaacs* (1867), 16 L. T. 529; *Liverpool Marine Credit Co.* v. *Hunter* (1867), L. R. 4 Eq. 62, at p. 68, *per* Lord HATHERLEY.

(*p*) *Per* BRAMWELL, B., in *Crawley* v. *Isaacs*, *supra*, at p. 531: "If the proceedings be in accordance with the practice of the foreign court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them." Compare note (*n*), *supra*.

(*q*) See *Boissière & Co.* v. *Brockner & Co.* (1889), 6 T. L. R. 85; and compare *Sheehy* v. *Professional Life Assurance Co.* (1857), 2 C. B. (N. S.) 211; *Crawley* v. *Isaacs*, *supra*. The questions which arise in cases where the defendant has not received proper notice of the proceedings against him, though sometimes dealt with under this head, are more conveniently discussed in connection with the jurisdiction and competence of the foreign court. See p. 286, *ante*.

(*r*) See *Simpson* v. *Fogo* (1863), 32 L. J. (CH.) 249, and the remarks of Lord CHELMSFORD, L.C., thereon in *Liverpool Marine Credit Co.* v. *Hunter* (1868), 3 Ch. App. 479, at p. 484. Foote (Private International Jurisprudence, 3rd ed., pp. 562, 563), however, holds that these are really cases of wrongful assumption of jurisdiction only.

(*s*) See *per* BLACKBURN, J., in *Godard* v. *Gray* (1870), L. R. 6 Q. B. 139, at p. 149.

(*t*) *Simpson* v. *Fogo, supra; Godard* v. *Gray, supra*.

(*a*) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C. A.

SECT. 3.—*Conclusiveness of Foreign Judgments.*

SECT. 3. **Conclusiveness of Foreign Judgments.**

Finality of foreign judgments.

428. A foreign judgment *in personam* is conclusive in England as between parties and privies. It is only impeachable for want of jurisdiction of the foreign court (*b*), or on the definite grounds above set forth (*c*); it is never impeachable or examinable on the merits (*d*), but remains in full force until it is reversed or set aside by the foreign court itself (*e*). It is no longer true that a foreign judgment is merely *primâ facie* evidence of a debt and that the defences available in the foreign action are equally available in an English action on the judgment (*f*). It follows, that where the foreign court proceeds on a mistaken view of English law, its judgment is nevertheless not impeachable in England, for in the foreign court English law is a question of fact only (*g*). It has been suggested, however, that the rule only applies where the defendant had an opportunity of adducing evidence with regard to the English law but neglected to avail himself of it (*h*); but, unless the court has perversely disregarded the English law applicable to the case (*i*), it is apprehended that no such limitation is to be placed on the rule. But where it is admitted by both parties that the foreign court has taken a wrong view of its own law, its judgment may possibly not be enforceable in England (*k*).

(*b*) See p. 284, *ante*.

(*c*) See pp. 287, 288, *ante*.

(*d*) *Henderson* v. *Henderson* (1844), 6 Q. B. 288. The English court "steers clear of an inquiry into the merits of the case upon the facts found, for whatever constituted a defence in that court ought to have been pleaded there" (*per* Lord DENMAN, C.J., at p. 298). See also *Gold* v. *Canham* (1679), cited 2 Swan. 325; *Cottington's Case* (1678), cited 2 Swan. 326, H. L.; *Martin* v. *Nicholls* (1830), 3 Sim. 458; *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717; *De Cosse Brissac* v. *Rathbone* (1861), 6 H. & N. 301; *Vanquelin* v. *Bouard* (1863), 15 C. B. (N. S.) 341; *Godard* v. *Gray* (1870), L. R. 6 Q. B. 139; *Ellis* v. *M'Henry* (1871), L. R. 6 C. P. 228 ("*ne lites immortales essent dum litigantes mortales sunt*," *per* BOVILL, C.J., at p. 239); *Re Henderson, Nouvion* v. *Freeman* (1887), 37 Ch. D. 244, C. A., and (1889) 15 App. Cas. 1, H. L. Compare also *Galbraith* v. *Neville* (1789), 1 Doug. (K. B.) 6, note, *per* BULLER, J.; *Ricardo* v. *Garcias* (1845), 12 Cl. & Fin. 368, H. L.; *Ochsenbein* v. *Papelier* (1873), 8 Ch. App. 695, *per* MELLISH, L.J., at p. 701; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C. A.

(*e*) Compare *Cottington's Case*, *supra*: "It is against the law of nations not to give credit to the judgments and sentences of foreign countries till they be reversed by the law and according to the forms of those countries wherein they were given" (*per* Lord NOTTINGHAM, *ibid.*); *Vanquelin* v. *Bouard*, *supra*.

(*f*) The earlier cases which so decide are not now law, such, for example, as *Walker* v. *Witter* (1778), 1 Doug. (K. B.) 1; *Phillips* v. *Hunter* (1795), 2 Hy. Bl. 402, Ex. Ch.; *Tarleton* v. *Tarleton* (1815), 4 M. & S. 20. For a discussion of these and other cases, see *Martin* v. *Nicholls* (1830), 3 Sim. 458, especially note (l), at p. 463; *Bank of Australasia* v. *Nias*, *supra*.

(*g*) *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414 (see *per* Lord COLONSAY, at p. 448); *Godard* v. *Gray*, *supra* (dissenting from Lord BROUGHAM'S opinion in *Houlditch* v. *Donegall* (*Marquis*) (1834), 2 Cl. & Fin. 471, H. L., at p. 477); *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch. D. 600. *Novelli* v. *Rossi* (1831), 2 B. & Ad. 757, can no longer be regarded as an authority.

(*h*) This proviso is suggested by HANNEN, J., in *Godard* v. *Gray*, *supra*; and is alluded to, but not with dissent, in *Re Trufort, Trafford* v. *Blanc*, *supra*, and *Re Henderson, Nouvion* v. *Freeman* (1887), 37 Ch. D. 244, C. A., *per* LINDLEY L.J., at p. 256.

(*i*) As in the case suggested by BLACKBURN, J., in *Godard* v. *Gray*, *supra*, at p. 149.

(*k*) *Meyer* v. *Ralli* (1876), 1 C. P. D. 358, a decision on a special case. *Sed*

SECT. 3. Conclusiveness of Foreign Judgments.

A sentence of condemnation pronounced by a foreign prize court is conclusive, in favour of underwriters and others, of the grounds on which the condemnation has proceeded (*l*). But the grounds of the condemnation must be clearly and unambiguously expressed (*m*).

SECT. 4.—*Foreign Judgments in Personam as Defences to an Action.*

Pleading foreign judgment in defence.

429. The judgment of a foreign court of competent jurisdiction in favour of either plaintiff or defendant, in respect of the same subject-matter, may be pleaded as a defence to proceedings begun in England by the unsuccessful party in the foreign action (*n*), the same tests as to the competence of the foreign court being applied as when the foreign judgment is relied on as a cause of action (*o*).

A foreign judgment that has been satisfied by the defendant cannot be sued upon in England, the satisfaction being a bar to all further proceedings on the judgment (*p*). But a foreign judgment will not be available as a defence unless it is final and conclusive between the parties (*q*), and unless it is pronounced upon the merits of the case (*r*). Thus, a litigant who has obtained judgment in a foreign court on a plea raising a foreign statute of limitations only cannot rely on the judgment in further proceedings in England, where the plaintiff's remedy is not yet extinguished (*s*).

The foreign judgment must be in respect of the same cause of action (*t*). A plaintiff who has unsuccessfully attempted to obtain

quære. See Foote, Private International Jurisprudence, 3rd ed., pp. 551, 561; Piggott, Foreign Judgments, 2nd ed., pp. 124, 125.

(*l*) *Geyer* v. *Aquilar* (1798), 7 Term Rep. 681. Though as a general rule a judgment, whether English or foreign, is only conclusive on the point actually decided therein, yet an exception exists in the case of judgments of prize courts; see remarks of BLACKBURN, J., in *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, at p. 434, citing *Lothian* v. *Henderson* (1803), 3 Bos. & P. 499, H. L., and other cases. This is, of course, a case of a judgment *in rem*, for which see p. 299, *post*; and see title PRIZE LAW AND JURISDICTION.

(*m*) See *Bernardi* v. *Motteux* (1781), 2 Doug. (K. B.) 575.

(*n*) *Ricardo* v. *Garcias* (1845), 12 Cl. & Fin. 368, H. L. Compare *Burrows* v. *Jemino* (1726), 2 Stra. 733. "The foreign judgment may be pleaded as *res judicata* because the foreign tribunal has already jurisdiction over the matter, and both parties having been regularly brought before the foreign tribunal, and that tribunal having adjudged between them, I think that such a judgment would be a bar to a subsequent suit in this country" (*per* Lord CAMPBELL in *Ricardo* v. *Garcias*, *supra*, at p. 401).

(*o*) See p. 282, *ante*. *Per* WIGRAM, V.-C., in *Henderson* v. *Henderson* (1843), 3 Hare, 100, at p. 117: "If the decree . . . is conclusive upon one party, it must, I conceive, be conclusive upon both; and if not conclusive upon both, it ought to be conclusive upon neither."

(*p*) *Barber* v. *Lamb* (1860), 8 C. B. (N. S.) 95. Where proceedings were taken in South Africa to enforce an English judgment, and the South African court refused to enforce the judgment in full, but gave judgment for a lesser sum, which was paid, the plaintiff, having elected to take the foreign judgment in discharge of his whole cause of action, was not allowed to sue afterwards in England for the balance of the original judgment (*Taylor* v. *Hollard*, [1902] 1 K. B. 676).

(*q*) *Plummer* v. *Woodburne* (1825), 4 B. & C. 625, where it did not clearly appear whether the foreign judgment might not have been in the nature of a nonsuit, and so not final and conclusive.

(*r*) *Harris* v. *Quine* (1869), L. R. 4 Q. B. 653.

(*s*) *Ibid.* It would of course be different if the foreign statute extinguished the right as well as the remedy; see *per* LUSH, J., at p. 658.

(*t*) *Callandar* v. *Dittrich* (1842), 4 Man. & G. 68.

rescission of a contract in a foreign court will not be debarred from bringing an action for damages for breach of the same contract in an English court (*a*). Nor will an adverse judgment in a foreign suit be a bar to an action in England asking for the same relief on facts giving rise to a different equity (*b*).

SECT. 4. Foreign Judgments in Personam as Defences to an Action.

A foreign judgment *in personam* is a bar to proceedings *in rem* in England in respect of the same subject-matter (*c*).

The English court will restrain a plaintiff from proceeding with a suit abroad after the English court has given judgment against him in an action on the same question (*d*).

The English court will not, in the exercise of its discretion, grant leave to serve the writ out of the jurisdiction in a case where the plaintiff's cause of action depends wholly upon the law of a foreign country, the courts of which have already decided that no cause of action exists (*e*).

SECT. 5.—*Extension of Judgments of English, Irish and Scottish Superior Courts.*

Extension of Superior Court judgments.

430. Though for purposes of private international law Ireland and Scotland are regarded as foreign countries (*f*), yet the manifest inconvenience of treating judgments of the courts of a part of the United Kingdom on the same footing as foreign judgments, so that they could not be enforced without a fresh action, has been recognised by the legislature. Accordingly it is now provided (*g*) that judgments of a superior court in any part of the United Kingdom for any debt, damages, or costs, may be certified in a prescribed form (*h*), and that such certificate may be registered in the courts

(*a*) *Callandar* v. *Dittrich* (1842), 4 Man. & G. 68.

(*b*) *Hunter* v. *Stewart* (1861), 31 L. J. (CH.) 346; Westlake, Private International Law, 4th ed., p. 385.

(*c*) *The Griefswald* (1859), Sw. 430, *per* Dr. LUSHINGTON, at p. 435: "I apprehend that if a party were plaintiff in this court *in rem*, and the court were satisfied by proof that there had been a judgment in proceedings on the same question *in personam*, the party proceeding here having been the plaintiff in the other court, this court would not allow the suit to proceed, and that too whether the proceedings *in personam* had been in a British or foreign court." But no action *in rem* lies in England on a foreign judgment *in personam* (*The City of Mecca* (1881), 6 P. D. 106, C. A.).

(*d*) *Booth* v. *Leycester* (1837), 1 Keen, 579; see *per* LANGDALE, M.R., at p. 580: "It has been justly observed at the bar that if an application had been made to the Court of Chancery in Ireland to stay the proceedings in the suit pending in that court, on the ground that the subject-matter of it was *res judicata* in a court of competent jurisdiction in this country, the authorities on this point would probably have induced the court to accede to the application."

(*e*) *Société Générale de Paris* v. *Dreyfus Brothers* (1887), 37 Ch. D. 215, C. A. (see *per* LINDLEY, L.J., at p. 225); R. S. C., Ord. 11, r. 1.

(*f*) As, for example, in the case of marriage and divorce, the English courts having no jurisdiction to decree a divorce when the parties are domiciled in Scotland or Ireland.

(*g*) Judgments Extension Act, 1868 (31 & 32 Vict. c. 54). Since the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 76, this Act applies to all divisions of the High Court; see *Re Howe Machine Co., Fontaine's Case* (1889), 41 Ch. D. 118, C. A.

(*h*) *Ibid.* The certificate is granted on an affidavit by the solicitor verifying the amount of the judgment and swearing to the abode of both parties to the action. The certificate is signed in England by a master of the Supreme Court.

SECT. 5. Extension of Judgments of Superior Courts.

of any other part of the United Kingdom, and from the date of such registration have the same force and effect as a judgment of the court in which they are registered. No certificate may be registered more than twelve months after the date of the judgment, without special leave of the court in which it is sought to register it (*i*). Every superior court in any part of the United Kingdom has the same control and jurisdiction over an extended judgment as it has over its own judgments, but only so far as relates to execution under the statute (*k*). Thus, a judgment summons cannot be issued in England on an Irish or Scottish judgment extended to England, for procedure by judgment summons is not "execution" of the judgment debt (*l*); nor can such a judgment be made the foundation of a bankruptcy notice (*m*). But it may be enforced by the appointment of a receiver by way of equitable execution (*n*).

Costs of action.

431. In any action brought upon a judgment which might have been registered under the statute the plaintiff can recover no costs unless the court otherwise orders (*o*). But a plaintiff is not required in any proceedings upon a registered certificate to give security for costs, even though he may be residing in a different part of the United Kingdom from that in which the proceedings are taken (*p*).

Impeaching original judgment.

432. An Irish or Scottish judgment extended to and registered in England gives rise to a new cause of action (*q*), and a defendant who desires to impeach the original judgment must do so in the courts of the country in which it was obtained (*r*). Thus, he will not be permitted to show in proceedings in England that the debt in respect of which the judgment was obtained in Scotland or Ireland is in fact barred by the Statute of Limitations (*s*); and it seems that a registration can only be set aside where the certificate is irregular on the face of it because it does not comply with the forms scheduled to the statute (*t*). But execution cannot be issued

(*i*) Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), ss. 1, 2, 3. Note that the Act has no application to a decreet pronounced by the Court of Session in Scotland during absence in an action proceeding on an arrestment used to found jurisdiction in Scotland (*ibid.*, s. 8).

(*k*) *Ibid.*, s. 4.

(*l*) *Re Watson, Ex parte Johnston*, [1893] 1 Q. B. 21, C. A.; compare *Stonor* v. *Fowle* (1887), 13 App. Cas. 20.

(*m*) *Re a Bankruptcy Notice*, [1898] 1 Q. B. 383, C. A. S. 4 of the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), "limits the operation of s. 3 to execution upon the judgments registered under it. It is clear that the present application does not relate to execution upon the judgment": *per* A. L. SMITH, L.J. See title BANKRUPTCY AND INSOLVENCY, Vol. II., at p. 26.

(*n*) *Thompson* v. *Gill*, [1903] 1 K. B. 760, C. A.

(*o*) Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 6.

(*p*) *Ibid.*, s. 5.

(*q*) *Re Low, Bland* v. *Low*, [1894] 1 Ch. 147, C. A., *per* LINDLEY, L.J., at p. 157.

(*r*) Compare *Newell* v. *Newell*, [1896] W. N. 160.

(*s*) See *Re Low, Bland* v. *Low*, *supra*. "We are bound by the statute to give the judgment the same force and effect as if it had been obtained in an English court. No attempt has been made, or, so far as I can see, can be made, to set aside the registration, and while the certificate exists, effect ought to be given to it": *per* DAVEY, L.J., at pp. 162, 163.

(*t*) See *Bailey* v. *Welply* (1869), I. R. 4 C. L. 243; *Part* v. *Scannell* (1875), I. R. 9 C. L. 426.

on a registered certificate if execution has been stayed by the court in which the judgment was originally obtained (*a*).

SECT. 5. Extension of Judgments of Superior Courts.

Limitations on extension.

433. The Judgments Extension Act, 1868 (*b*), only applies to judgments for "debts, damages and costs" (*c*), and thus many decrees of a court of equity, together with injunctions, judgments in actions for the recovery of land, and the like, are excluded (*d*).

Irish Chancery decrees.

434. So far as regards judgments of the Chancery Division in Ireland, the Crown Debts Act, 1801 (*e*), provided that where in any suit between party and party any decree shall be pronounced or any order made for payment of or for accounting for money by the Court of Chancery in Ireland, the Lord Chancellor of Ireland shall, upon application, cause a copy of such order or decree to be exemplified and certified to the Court of Chancery in England, and the Lord Chancellor in England shall cause such order and decree to be enrolled in the Court of Chancery in England, and shall cause process of attachment and committal to issue to enforce obedience to the same as fully and effectually as if such order and decree had been originally pronounced in the Court of Chancery in England (*f*). This jurisdiction can now be exercised by any judge of the Chancery Division of the High Court (*g*), and has been extended to orders made in any matter or proceeding by petition in cases of minors, bankrupts, idiots or lunatics (*h*).

There is no machinery for enrolling a decreet of a Scottish court in the Chancery Division in a similar manner except in so far as is permitted by the Judgments Extension Act, 1868 (*i*).

An Irish judgment extended to and enrolled in England in the High Court can be enforced by attachment in England (*k*), but not where the Irish order has directed the defendant to perform some

(*a*) See Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 3, and Mr. Dicey's comment (Dicey, Conflict of Laws, 2nd ed., p. 422).

(*b*) 31 & 32 Vict. c. 54.

(*c*) *Ibid.*, ss. 1, 2, 3.

(*d*) See *Wotherspoon* v. *Connolly* (1871), 9 Macph. (Ct. of Sess.) 510; Piggott, Foreign Judgments, 2nd ed., p. 359; and compare *Re Dundee Suburban Rail. Co.* (1888), 37 W. R. 50. The Irish courts, it seems, refuse to be bound by R. S. C., Ord. 42, r. 24, and will not register a certificate of an "order" (as distinct from a judgment) for the payment of money (see *Re Howe Machine Co., Fontaine's Case* (1889), 41 Ch. D. 118, C. A.). A garnishee order can be made in respect of an English judgment extended to Ireland (*Johnstone* v. *Bucknall*, [1898] 2 I. R. 499).

(*e*) 41 Geo. 3, c. 90.

(*f*) Crown Debts Act, 1801 (41 Geo. 3, c. 90), s. 6.

(*g*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 34 (2), 39.

(*h*) Crown Debts Act, 1824 (5 Geo. 4, c. 111); and compare Crown Debts Act, 1801 (41 Geo. 4, c. 90), s. 5.

(*i*) 31 & 32 Vict. c. 54; *Re Dundee Suburban Rail. Co.* (1888), 37 W. R. 50. The jurisdiction to enrol in Chancery under the Crown Debts Acts, 1801 (41 Geo. 3, c. 90), and 1824 (5 Geo. 4, c. 111), must be carefully distinguished from the jurisdiction to register certificates of judgments under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54); the restriction to "debts, damages and costs" only exists in the latter statute. Compare *Emanuel* v. *Bridger* (1874), L. R. 9 Q. B. 286.

(*k*) *Newell* v. *Newell*, [1896] W. N. 160 (2), following *Hazelton* v. *Bright*, [1873] W. N. 3, and *Pennefather* v. *Short*, [1866] W. N. 102, C. A., 126.

SECT. 5. Extension of Judgments of Superior Courts.

act within a specified number of days after service of the order upon him, and the service has been effected in England (*l*).

No sequestration against peers.

435. Where an order of the Chancery Division of the English High Court against a peer has been extended to and enrolled in Ireland (*m*), it cannot be enforced by sequestration, which is a remedy not prescribed by the statute under which the order is extended (*n*), although the remedy in fact prescribed is not available against a peer (*o*).

SECT. 6.—*Extension of Judgments of English, Irish and Scottish Inferior Courts.*

Extending judgments of inferior courts.

436. A judgment of any of the inferior courts of England, Scotland, or Ireland for any debt, damages, or costs may be enforced in other parts of the United Kingdom than that in which it was originally obtained (*p*). By "inferior courts" is meant county courts, civil bill courts, and all courts in England and Ireland having jurisdiction to hear and determine civil causes, other than the High Courts of Justice; the expression includes courts of petty sessions and of bankruptcy in Ireland, and sheriff's courts and courts held under the Small Debts and Debts Recovery Acts in Scotland (*q*).

Registration and execution.

437. A certificate in the prescribed form is first obtained from the registrar or other proper officer, and may then (provided twelve months from the date of the judgment have not expired) be registered in any other inferior court in another division of the United Kingdom (*r*). After registration, process of execution may issue out of the court where the registration has been effected as upon a judgment of that court (*s*), but no further proceedings are permitted in the court from which the certificate has been issued, until the court shall so order on proof that the execution issued under the certificate has been ineffective (*t*). Reasonable costs of obtaining and registering the certificate may be added to and recovered with the original judgment (*a*). The court in which the certificate is registered has the same control and jurisdiction over any certified and registered judgment with respect to its execution as it has over its own judgments, and may, on proof that the original judgment is set aside or satisfied, cancel the registration (*b*). A plaintiff who brings an action on a judgment which ought to be registered under the Act will recover no costs unless the court otherwise orders (*c*).

(*l*) *Re Synge* (1902), 84 L. T. 756; unless, it would seem, the Irish court in the order has authorised service out of the jurisdiction (*ibid.*).
(*m*) Under the Crown Debts Act, 1801 (41 Geo. 3, c. 90), s. 5.
(*n*) *Ibid.*
(*o*) *Kilworth* (*Lord*) v. *Mountcashell* (*Lord*) (1892), 31 L. R. Ir. 81.
(*p*) Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31).
(*q*) *Ibid.*, s. 2.
(*r*) *Ibid.*, ss. 3, 4. An English judgment can be extended to Scotland or Ireland, an Irish to England or Scotland, a Scottish to England or Ireland.
(*s*) *Ibid.*, s. 5.
(*t*) County Court Rules, Ord. 45, r. 5.
(*a*) Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), s. 4.
(*b*) *Ibid.*, ss. 67.
(*c*) *Ibid.*, s. 8.

SECT. 6. **Extension of Judgments of Inferior Courts.**

438. The judgment to be extended must not be for a greater amount than that for which an action might have been brought in the court in which it is sought to register the certificate, but a judgment of an inferior court in Scotland which cannot for this reason be extended to an inferior court in England or Ireland may be registered under the Judgments Extension Act, 1868 (*d*). The Act does not apply to a judgment of an inferior court against any person domiciled in another part of the United Kingdom (*e*) at the time of the commencement of the action, unless the whole cause of action shall have arisen or the obligation to which the judgment relates ought to have been fulfilled within the county court district where the judgment was obtained, and the summons was served on the defendant personally within that district (*f*).

Limitation on extension.

A prohibition or injunction against registration can be obtained in cases where the Act does not apply (*g*).

SECT. 7.—*Foreign Judgments in rem.*

439. A foreign judgment *in rem* is a judgment by a court of competent jurisdiction as to the title to or disposition of a thing within the lawful control of the State under the authority of which the court sits (*h*) (including judgments *in rem* of Admiralty Courts), or a judgment as to the status of a person (*i*). Such a judgment is conclusive and binding in England, not only as between parties and privies (as in the case of a judgment *in personam* (*k*)), but against all the world (*l*).

Judgments *in rem*.

So far as concerns proceedings *in rem* with respect to movables within the jurisdiction of the foreign court, it is not necessary to make the judgment conclusive against all the world that there should be an actual adjudication as to the status of the thing itself (*m*). A decision as to right or title will of course be conclusive (*n*), but so also will be any disposition by the court by way

As to movables.

(*d*) 31 & 32 Vict. c. 54, s. 3; Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), s. 9.

(*e*) *I.e.*, of an English court against a person domiciled in Scotland or Ireland; of an Irish court against a person domiciled in England or Scotland; of a Scottish court against a person domiciled in England or Ireland.

(*f*) Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), s. 10; and see title COUNTY COURT.

(*g*) *Ibid.* The court cannot inquire into the merits or the regularity of the proceedings in the inferior court (*Williams* v. *Dolland* (1876), 1 C. P. D. 227).

(*h*) See *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, *per* BLACKBURN, J., at pp. 429, 435; *per* Lord CHELMSFORD, at p. 448.

(*i*) *Hobbs* v. *Henning* (1865), 34 L. J. (C. P.) 117, at p. 123; *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch. D. 600; *Bater* v. *Bater*, [1906] P. 209, C. A.

(*k*) P. 289, *ante*.

(*l*) *Hobbs* v. *Henning, supra; Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414; *Messina* v. *Petrococchino* (1872), L. R. 4 P. C. 144; *The City of Mecca* (1881), 6 P. D. 106, at p. 112; *Re Trufort, Trafford* v. *Blanc, supra; Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455, C. A.; *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London, and China*, [1897] 1 Q. B. 55, 460, C. A.

(*m*) *Per* BLACKBURN, J., in *Castrique* v. *Imrie, supra*, at p. 428.

(*n*) *I.e.*, the conclusiveness of a judgment on the status of a thing is only an illustration of a wider principle.

SECT. 7. **Foreign Judgments in rem.**

of sale, transfer or otherwise (*o*), as, for example, where a Court of Admiralty orders the sale of a ship to satisfy a maritime lien (*p*), or a prize court orders the sale of goods because they have been adjudged lawful prize (*q*). The foreign court in such a case can give to a *bonâ fide* purchaser a title which cannot be impeached in England, even though by English law some other person would (but for the foreign judgment) have been regarded as owner of the thing sold or as having preferential rights over it (*r*).

As to immovables.

The conclusiveness of a foreign judgment *in rem* relating to foreign land is based rather on the exclusive jurisdiction which the courts of every country claim to exercise over land situate within that country; and, on the same principle, no foreign judgment affecting to adjudicate on the title to English realty would receive recognition in an English court (*s*).

On questions of status.

440. The judgment of a foreign court adjudicating on a question of status is binding and conclusive in England, provided that the foreign court was one which, according to the rules of English law, had jurisdiction so to adjudicate (*t*), and the status is not penal or at least one which English law refuses to recognise (*a*). Thus, the judgment of the courts of the domicil of a deceased person in matters concerning the succession to his estate is binding in England, involving, as such a judgment will often do, a decision on questions of nationality or legitimacy (*b*). So, too, a decree of

(*o*) *Per* BLACKBURN, J., in *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, at p. 428, citing Story, Conflict of Laws, s. 592.

(*p*) See *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London, and China*, [1897] 1 Q. B. 55, 460, C. A. "The money as well as the ship herself was subject to the jurisdiction of the court": *per* CHITTY, L.J., at p. 468. The maritime lien enforced by the German court in this case was one not even recognised by English law.

(*q*) *Stringer* v. *English and Scottish Marine Insurance Co.* (1870), L. R. 5 Q. B. 599, Ex. Ch. It is pointed out by BLACKBURN, J., in *Castrique* v. *Imrie, supra*, at p. 429, that, according to the rule of English law, if personal property is disposed of in a manner binding according to the law of the country where it is situated, that disposition is binding everywhere; and he goes on to say: "It may very well be that the rule commonly expressed by English lawyers that a judgment *in rem* is binding everywhere, is in truth but a branch of that more general principle" (*ibid.*). See on this point *Cammell* v. *Sewell* (1860), 5 H. & N. 728, Ex. Ch.; *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1891] 1 Ch. 536; *Alcock* v. *Smith*, [1892] 1 Ch. 238, C. A.; *Embiricos* v. *Anglo-Austrian Bank*, [1904] 2 K. B. 870; [1905] 1 K. B. 677, C. A.; *Kelly* v. *Selwyn*, [1905] 2 Ch. 117; and p. 213, *ante*.

(*r*) Compare *Castrique* v. *Imrie, supra*; *Stringer* v. *English and Scottish Marine Insurance Co., supra*; *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia, supra, per* NORTH, J., at p. 545.

(*s*) P. 199, *ante*.

(*t*) *Hobbs* v. *Henning* (1865), 34 L. J. (C. P.) 117; *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch. D. 600; *Bater* v. *Bater*, [1906] P. 209, C. A.

(*a*) *Re Selot's Trusts*, [1902] 1 Ch. 488 (French "prodigue"); *Worms* v. *de Valdor* (1880), 49 L. J. (CH.) 261; compare *Huntington* v. *Attrill*, [1893] A. C. 150.

(*b*) *Doglioni* v. *Crispin* (1866), L. R. 1 H. L. 301; *Re Trufort, Trafford* v. *Blanc, supra*. "The rule to be extracted from these cases appears to be this, that although the parties claiming to be entitled to the estate of the

SECT. 7. Foreign Judgments in rem.

divorce is a matter affecting status (*c*), and a foreign decree pronounced by a competent court will be binding in England (*d*).

441. Judgments *in rem*, equally with judgments *in personam*, are binding even though the foreign court has mistaken English law (*e*), and though all the facts were not before it (*f*).

Judgment usually conclusive.

Judgments *in rem* are also examinable on the same grounds as judgments *in personam*, such as fraud or want of jurisdiction (*g*) and (perhaps) a total disregard of international law (*h*). But it is still doubtful how far a foreign judgment *in rem* is binding in England where the foreign court has admittedly mistaken its own law (*i*). Fraud, however, to be available as a defence must be pleaded by one of the parties to the foreign litigation; a judgment *in rem* cannot be impeached for fraud by third parties (*k*).

Exceptions.

Though not examinable on the merits, a judgment *in rem* is only conclusive against all the world on the point actually decided in the case; further than this it is not conclusive as to the grounds on which the judgment proceeded (*l*).

Only conclusive on point decided.

442. But an exception to this rule exists in the case of judgments of prize courts, the grounds of the condemnation as well as the condemnation itself being regarded as conclusive against underwriters and all the world, as, for example, that there has been a breach of warranty of neutrality (*m*). Where, however, there is any ambiguity

Prize court judgments are exceptions.

deceased person may not be bound to resort to the tribunals of the country in which the deceased was domiciled . . . yet where the title has been adjudicated upon by the courts of the domicil, such adjudication is binding on and must be followed by the courts of this country": *per* STIRLING, J., at p. 611.

(*c*) See Foote, Private International Jurisprudence, 3rd ed., p. 578. But foreign decrees of nullity of marriage are not judgments *in rem* and are not necessarily binding in England (*Ogden* v. *Ogden*, [1908] P. 46, C. A.).

(*d*) *Bater* v. *Bater*, [1906] P. 209, C. A., where the subject is fully discussed; see also p. 266, *ante*, as to the competency of courts.

(*e*) *Re Trufort, Trafford* v. *Blanc* (1887), 36 Ch. D. 600; *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414.

(*f*) See *Re Trufort, Trafford* v. *Blanc*, *supra*.

(*g*) *Castrique* v. *Imrie*, *supra*; *Messina* v. *Petrococchino* (1872), L. R. 4 P. C. 144. As to whether collusion between the parties will invalidate a decree of divorce pronounced abroad, see *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55; and p. 269, *ante*. Non-disclosure of material facts will not render a foreign decree invalid (*Bater* v. *Bater*, [1906] P. 209, C. A.).

(*h*) *Simpson* v. *Fogo* (1862), 32 L. J. (CH.) 249. See the remarks on this case by Lord HATHERLEY (who had decided it as WOOD, V.-C.) and by BLACKBURN, J., in *Castrique* v. *Imrie*, *supra*, at pp. 445 and 436 respectively.

(*i*) See *Meyer* v. *Ralli* (1876), 1 C. P. D. 358, *supra*.

(*k*) *Bater* v. *Bater*, *supra*, following *Castrique* v. *Behrens* (1861), 30 L. J. (Q. B.) 163; compare remarks of BLACKBURN, J., in *Castrique* v. *Imrie*, *supra*, at p. 433.

(*l*) *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455, C. A.

(*m*) See *per* BLACKBURN, J., in *Castrique* v. *Imrie*, *supra*, at pp. 434, 435, citing *Lothian* v. *Henderson* (1803), 3 Bos. & P. 499, H. L. Lord ELDON'S view in that case was that "the practice of receiving the sentences of prize courts as conclusive of the collateral matter was originally a mistake, but had become inveterate and could not now be disturbed." He further refers to the rule as "originally vicious but now become law"; see also *Geyer* v. *Aguilar* (1798), 7 Term Rep. 681 at p. 695; *Donaldson* v. *Thompson* (1808), 1 Camp. 429. In *Ballantyne* v. *Mackinnon*, *supra*, prize court cases are treated as

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as to the grounds on which the court has proceeded, its findings of fact will not be held to be binding (*n*), and in any case such findings cannot be pleaded as an estoppel (*o*).

SECT. 8.—*Lis Alibi Pendens.*

SUB-SECT. 1.—*Stay of English Proceedings begun during pendency of Foreign Suit.*

Stay of proceedings in England.

443. An action in a foreign court, in order to operate as a complete defence in English proceedings relating to the same subject-matter, must have become *res judicata* (*p*), though it would seem to be open to some doubt whether the judgment of the foreign court must have been pronounced before the issue of the writ in the English action, or whether it may be advanced as a defence if pronounced at any time before judgment in England (*q*). But though to bring two actions in England in respect of the same matter is regarded as *primâ facie* vexatious and the court will generally, as of course, put the plaintiff to his election (*r*), yet no such presumption arises where one of the actions is in a foreign court (*s*), and the fact that an action has been begun and is pending abroad is no answer in itself to similar proceedings in England (*t*).

When granted.

The English court will, however, restrain an action, begun in England, by reason of the existence of a *lis alibi pendens*, in cases where it would be in fact vexatious and oppressive to allow the English action to continue (*a*); but in such a case the burden of

"exceptional." The sentence of a prize court that no other person is entitled to a share of the prize money is conclusive (*Duckworth* v. *Tucker* (1809), 2 Taunt. 7).

(*n*) *Dalgleish* v. *Hodgson* (1831), 7 Bing. 495, *per* TINDAL, C.J.; compare *Bernardi* v. *Motteux* (1781), 2 Doug. (K. B.) 575; *Calvert* v. *Bovill* (1798), 7 Term Rep. 523.

(*o*) *Hobbs* v. *Henning* (1865), 34 L. J. (C. P.) 117, *per* ERLE, C.J., at p. 124. This rule is not confined to the judgments of prize courts (see *Simpson* v. *Fogo* (1862), 32 L. J. (CH.) 249; Foote, Private International Jurisprudence, 3rd ed., p. 575); and see title PRIZE LAW AND JURISDICTION.

(*p*) See p. 290, *ante*.

(*q*) *The Delta*, *The Erminia Foscolo* (1876), 1 P. D. 393, following the rule laid down in *The Mali Ivo* (1869), L. R. 2 A. & E. 356; *The Catterina Chiazzare* (1876), 1 P. D. 368. But compare *Houstoun* v. *Sligo* (*Marquis*) (1885), 29 Ch. D. 448, C. A.; Foote, Private International Jurisprudence, 3rd ed., pp. 580, 581. It is submitted that the view taken by Mr. Foote as to the admissibility of the plea during the pendency of an English action is correct.

(*r*) Compare *McHenry* v. *Lewis* (1882), 22 Ch. D. 397, C. A.

(*s*) *McHenry* v. *Lewis*, *supra*; *Peruvian Guano Co.* v. *Bockwoldt* (1883), 23 Ch. D. 225, C. A.

(*t*) *Bayley* v. *Edwards* (1792), 3 Swan. 703, P. C.; *Ostell* v. *Lepage* (1851), 5 De G. & Sm. 95; (1852) 2 De G. M. & G. 892, C. A. (decree in a Calcutta suit for an account, but account not yet taken); *Cox* v. *Mitchell* (1859), 7 C. B. (N. S.) 55; *Wilson* v. *Ferrand* (1871), L. R. 13 Eq. 362; *McHenry* v. *Lewis*, *supra* (disapproving *Dillon* (*Lord*) v. *Alvarez* (1798), 4 Ves. 357); *Peruvian Guano Co.* v. *Bockwoldt*, *supra*; *Thornton* v. *Thornton* (1886), 11 P. D. 176, C. A.; *Hyman* v. *Helm* (1883), 24 Ch. D. 531, C. A., *per* BRETT, L.J., at p. 538; *In the Goods of Bryan* (1904), 20 T. L. R. 290. The remarks of Lord COTTENHAM, L.C., in *Wedderburn* v. *Wedderburn* (1840), 4 My. & Cr. 585, at p. 596, are not in accordance with the rule laid down in the later cases. See, also, *Jopson* v. *James* (1908), 77 L. J. (CH.) 824, C. A., where stress is laid on considerations of international comity.

(*a*) *Ostell* v. *Lepage*, *supra*; *McHenry* v. *Lewis* (1882), 22 Ch. D. 397, C. A.

proving special circumstances which would justify the English court in interfering lies on him who asserts them (*b*). The court has an inherent jurisdiction to restrain vexatious and oppressive litigation and to prevent the administration of justice being perverted for unjust ends (*c*). The circumstances of each case will be considered, and no general rule can be laid down (*d*); but the court will not interfere where a plaintiff obtains some benefit in bringing the two actions (*e*), as, for example, greater facility of execution in one court (*f*), or different forms of procedure and different remedies (*g*). Where proceedings have been begun in the foreign court, and the defendant in those proceedings afterwards brings an action in England, the English court will not restrain him from doing so, except on the same principles (*h*). Where, for example, partners have agreed to refer all disputes to a foreign court, and two of them have begun proceedings for winding up the partnership abroad, the English court will interfere to restrain the third partner from bringing a suit for dissolution in England, because by entering into the partnership agreement the partners had themselves chosen a forum (*i*). But a wife's suit against her husband in England will not be stayed merely because a foreign suit for divorce has been instituted abroad by the husband (*j*).

When stay granted though no foreign proceedings begun.

Proceedings in England will also be stayed, although no suit may actually be pending abroad, if the parties have agreed to submit all

(*b*) See *Hyman* v. *Helm* (1883), 24 Ch. D. 531.

(*c*) *McHenry* v. *Lewis* (1882), 22 Ch. D. 397, C. A., *per* BOWEN, L.J., at p. 408. But where a colonial court has made an order, and a conflicting order has been made in ignorance of the former by an English judge, there is no jurisdiction to set the latter aside (*Naval, Military, and Civil Service Co-operative Society of South Africa, Ltd.* v. *Services, Ltd.* (1906), 51 Sol. Jo. 13).

(*d*) *McHenry* v. *Lewis, supra.* For a discussion of the meaning of "vexatious and oppressive," see *per curiam* in *Logan* v. *Bank of Scotland* (No. 2), [1906] 1 K. B. 141, at pp. 151 *et seq.*, C. A.; *The Hagen*, [1908] P. 189, C. A.; *Re Norton's Settlement, Norton* v. *Norton*, [1908] 1 Ch. 471, C. A.

(*e*) See *Peruvian Guano Co.* v. *Bockwoldt* (1883), 23 Ch. D. 225, C. A., at pp. 230, 232, and 234.

(*f*) *Peruvian Guano Co.* v. *Bockwoldt, supra.*

(*g*) *McHenry* v. *Lewis, supra;* compare *Cox* v. *Mitchell* (1859), 7 C. B. (N. S.) 55, at p. 57; compare *The Hagen, supra; In the Goods of Bryan*, [1904] 20 T. L. R. 290.

(*h*) See *Thornton* v. *Thornton* (1886), 11 P. D. 176, C. A., at pp. 180, 181; and compare *Cruickshanks* v. *Robarts* (1821), 6 Madd. 104; *Transatlantic Co.* v. *Pietroni* (1860), John. 604; *Law* v. *Garrett* (1878), 8 Ch. D. 26, C. A.

(*i*) *Law* v. *Garrett, supra.* The agreement to refer disputes to the foreign court was held to be within s. 11 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125); compare *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Co.*, [1903] 1 K. B. 249, C. A., a similar case under s. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49); and *Kirchner* v. *Gruban* (1908), 53 Sol. Jo. 151. The court in *Law* v. *Garrett, supra*, refused to appoint a receiver pending the reference, though agreeing that they had jurisdiction to do so; see also on this point *Transatlantic Co.* v. *Pietroni, supra.*

(*j*) *Thornton* v. *Thornton* (1886), 11 P. D. 176, C. A. This was a strong case, for the husband was only home from India on short leave, and most of the witnesses were in India also. See also *Von Eckhardstein* v. *Von Eckhardstein* (1907), 23 T. L. R. 539, 593, C. A.

SECT. 8. Lis Alibi Pendens.

their disputes to a foreign tribunal (*k*), or if the action ought properly to be brought in another court, and it would be oppressive to the defendant to allow the English proceedings to continue (*l*).

SUB-SECT. 2.—*Restraint of Foreign Proceedings begun during Pendency of English Suit.*

Restraint of foreign proceedings.

444. Where there are no proceedings at all in England between the parties, the English courts will not entertain an action by the defendant in a suit before a foreign court to restrain the plaintiff from prosecuting his action, unless there is some equity to justify them in doing so (*m*). It is not sufficient to allege that the proceedings abroad are unreasonable, harsh, or inconvenient to the defendant if the plaintiff in the foreign suit has in fact a legal right to bring the action in the foreign country according to the law there in force (*n*). But foreign proceedings may be restrained where the matter is already *res judicata* in England (*o*).

Just, however, as the English courts will, in appropriate circumstances, stay an action in England where there is already a foreign suit pending in respect of the same matter, so a party to an action begun in England will be restrained from taking subsequently other proceedings abroad, if the fact of his doing so is contrary to good faith, or harassing or vexatious to the other party to the litigation, or interferes with the proper course of justice in England (*p*). But concurrent proceedings abroad taken after the English action has begun are not in themselves *primâ facie* vexatious, and before granting relief the court requires to be fully satisfied of their oppressive character (*q*). The court, in other words, has a discretion (*r*), and if the foreign proceedings are likely to be of advantage to the party prosecuting them it will not interfere (*s*). But where a defendant in a pending English suit began proceedings abroad to perpetuate testimony which would have enabled him, in effect, to interrogate the witnesses of the other party before trial, he was restrained, because the proceedings were injurious to the course of justice in the English suit (*t*).

(*k*) See *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Co.*, [1903] 1 K. B. 249, C. A.; *Kirchner* v. *Gruban* (1908), 53 Sol. Jo. 151.

(*l*) *Logan* v. *Bank of Scotland* (*No.* 2), [1906] 1 K. B. 141, C. A.; *Egbert* v. *Short*, [1907] 2 Ch. 105; *Re Norton's Settlement, Norton* v. *Norton*, [1908] 1 Ch. 471, C. A.

(*m*) *Fletcher* v. *Rodgers* (1878), 27 W. R. 97, C. A.

(*n*) *Ibid.*

(*o*) *Booth* v. *Leycester* (1837), 1 Keen, 579.

(*p*) *Carron Iron Co.* v. *Maclaren* (1855), 5 H. L. Cas. 416; *Armstrong* v. *Armstrong*, [1892] P. 98. See also *Baird* v. *Prescott* (1890), 6 T. L. R. 231, C. A.; *Dawkins* v. *Simonetti* (1880), 50 L. J. (P.) 30, C. A.; *Hyman* v. *Helm* (1883), 24 Ch. D. 531, C. A.

(*q*) See *Hyman* v. *Helm*, *supra*.

(*r*) *Dawkins* v. *Simonetti*, *supra*.

(*s*) *Hyman* v. *Helm*, *supra* (advantages of procedure and execution); *Baird* v. *Prescott*, *supra* (particular relief only obtainable in foreign court); *Dawkins* v. *Simonetti*, *supra* (balance of convenience).

(*t*) *Armstrong* v. *Armstrong*, *supra*. It was pointed out by JEUNE, P., that the defendant would be under no obligation to produce the evidence which he had collected when the suit came on for trial in England, as he would have been if it had been taken on commission, and that much of it would in any event have been inadmissible. The foreign proceedings were therefore not only an

The fact that the contract which is the subject-matter of an action was made in England, and that all the witnesses are in England also, is not in itself sufficient to justify the English court in restraining other proceedings abroad (*u*).

SUB-SECT. 3.—*Admiralty Actions.*

Restraint in Admiralty Division.

445. The principles on which the Admiralty Division acts in staying suits *in rem* in England on account of a *lis alibi pendens*, and in restraining foreign suits where a complete remedy is afforded in England, are the same as those in the case of actions *in personam;* but it seems that that court, if satisfied that the *lis alibi pendens*, whether *in rem* or *in personam* (*a*), affords a plaintiff a complete remedy, will usually stay all other proceedings (*b*).

446. An action *in rem* in England will be stayed if the plaintiffs have already begun an action *in rem* abroad and bail has been given to release the ship, because it would be oppressive to allow the ship to be arrested a second time (*c*); and the same result will follow when the action in England is one *in personam* (*d*). Proceedings *in rem* in England will be restrained when a ship has been arrested abroad and afterwards released on a guarantee being given for the amount of the damage, though no litigation was going on abroad between the parties (*e*). But where, though mutual guarantees had been given, the ship had never been arrested abroad, the English court has refused to stay proceedings in England (*f*).

interference with the English suit, but also useless in the sense that the defendant could obtain no legitimate advantage from them.

(*u*) *Hyman* v. *Helm* (1883), 24 Ch. D. 531, C. A. See also *Fletcher* v. *Rodgers* (1878), 27 W. R. 97, C. A., where a similar argument was advanced.

(*a*) *The Mali Ivo* (1869), L. R. 2 A. & E. 356.

(*b*) *Ibid. The Catterina Chiazzaro* (1876), 1 P. D. 368; *The Delta, The Erminia Foscolo* (1876), 1 P. D. 393; *The Christiansborg* (1885), 10 P. D. 141, C. A.; *The Jasep* (1896), 12 T. L. R. 375. But see *Harmer* v. *Bell, The Bold Buccleugh* (1851), 7 Moo. P. C. C. 267, where a plea of *lis alibi pendens* was held bad, the foriegn suit being *in personam* only and the arrest of the ship only collateral to secure the debt claimed, while the English proceedings were *in rem.* The test is the *completeness* of the foreign remedy. *The Griefswald* (1859), Sw. 430, and *The Lanarkshire* (1855), 2 Spinks, 189, do not support the decision in *Harmer* v. *Bell, The Bold Buccleugh, supra.* See title ADMIRALTY, Vol. I., 57.

(*c*) *The Christiansborg, supra.*

(*d*) *The Peshawur* (1883), 8 P. D. 32. The court of course has a discretion; see *The Manar*, [1903] P. 95; *The Hagen*, [1908] P. 189, C. A.

(*e*) *The Jasep, supra*, following *The Christiansborg, supra*, JEUNE, P., remarking that he was not satisfied that the guarantee given would not give the plaintiffs full protection. The suit was therefore restrained as being against good faith, though the plaintiffs could have got larger bail in England.

(*f*) *The Mannheim*, [1897] P. 13. Compare *The Reinbeck* (1889), 6 Asp. M. L. C. 366, C. A.

The following cases may also be referred to on this topic:—suits relating to foreign realty: *Bunbury* v. *Bunbury* (1839), 1 Beav. 318 (foreign proceedings restrained); *Buenos Ayres and Ensenada Port Rail. Co.* v. *Northern Railway of Buenos Ayres* (1877), 2 Q. B. D. 210 (injunction refused for want of proof that foreign court had assumed exclusive jurisdiction); *Cood* v. *Cood* (1863), 33 L. J. (CH.) 273 (no jurisdiction to restrain when foreign suit concerns right to foreign realty); *Moor* v. *Anglo-Italian Bank* (1879), 10 Ch. D. 681 (injunction refused against judgment creditors in England seeking to attach foreign realty, the property of a company being wound up in England); *Re Boustead, Ex parte*

PART XI. Procedure.

Part XI.—Procedure.

Lex fori governs procedure.

447. The general principle is that all matters of procedure are governed by the *lex fori*, that is, the law of the country in which the action is brought (*g*). That law will be decisive as to the

Rogers (1881), 16 Ch. D. 665, C. A. (leave must be obtained from Bankruptcy Court by mortgagees before issuing sequestration against realty belonging to the bankrupts in a colony to secure appearance); *Elliott* v. *Minto* (*Lord*) (1821), 6 Madd. 16 (action in England stayed pending decision in Scotch proceedings relating to Scotch realty); *Beckford* v. *Kemble* (1822), 1 Sim. & St. 7 (action for foreclosure by mortgagees of West Indian land restrained after an action had been brought to redeem in England); *Hope* v. *Carnegie* (1866), 1 Ch. App. 320; *Carron Iron Co.* v. *Maclaren* (1855), 5 H. L. Cas. 416. Administration cases: *Graham* v. *Maxwell* (1849), 1 Mac. & G. 71 (English creditor restrained from proceeding for recovery of a debt in a foreign court after notice of an English administration decree); *Jones* v. *Geddes* (1846), 1 Ph. 724 (balance of convenience considered); *Hope* v. *Carnegie*, *supra*; *Carron Iron Co.* v. *Maclaren*, *supra* (foreign creditor suing in foreign court will not be restrained); *Re Boyse*, *Crofton* v. *Crofton* (1880), 15 Ch. D. 591 (the same); *Beauchamp* v. *Huntley* (*Marquis*) (1822), Jac. 546 (incumbrancer restrained from proceeding in Ireland after English administration decree); *Eustace* v. *Eloyd* (1876), 35 L. T. 900 (suit for specific performance of Irish lease restrained after administration decree). Bankruptcy cases: *Re Distin*, *Ex parte Ormiston* (1871), 24 L. T. 197 (English creditor restrained from suing in foreign court for debt incurred in England); *Re Tait & Co.*, *Ex parte Tait* (1872), L. R. 13 Eq. 311 (Irish proceedings restrained on a claim provable in an English bankruptcy); *Re Chapman* (1872), L. R. 15 Eq. 75 (injunction refused in same circumstances against a foreigner); *Pennell* v. *Roy* (1853), 3 De G. M. & G. 126, C. A. (the same); *Phosphate Sewage Co.* v. *Molleson* (1876), 1 App. Cas. 780 (refusal to stay Scotch proceedings where trustee in Scotland had rejected the company's proof, and a suit was afterwards begun in England). Winding up of companies: *Re Oriental Inland Steam Co.*, *Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557 (judgment creditors of company restrained from attaching personal property abroad belonging to company); but see *Re International Pulp and Paper Co.* (1876), 3 Ch. D. 594; *Re Queensland Mercantile Agency Co.*, *Ex parte Australian Investment Co.*, [1888] W. N. 62 (action pending in Scotland restrained on ground that matters in respect of which it was brought would be more conveniently investigated in winding-up). Trusts: *Harrison* v. *Gurney* (1821), 2 Jac. & W. 563 (trustees for creditors after decree for execution of trusts restrained from proceeding for same purpose abroad). Miscellaneous: *Duprez* v. *Veret* (1868), L. R. 1 P. & D. 583 (stay of English action refused, the subject-matter of English and foreign suits being different); *Bushby* v. *Munday* (1821), 5 Madd. 297 (proceedings in Scotland on bond given for gaming transactions restrained, action having been begun in England to set aside bond, certain rights reserved to plaintiff in Scotland); *Hearn* v. *Glanville* (1883), 48 L. T. 356 (foreign action restrained, property and parties being in England); *Venning* v. *Loyd* (1859), 1 De G. F. & J. 193, C. A. (balance of convenience); *Ainslie* v. *Sims* (1853), 23 L. J. (CH.) 161 (Scotch action restrained on proof of more effectual justice in England); *Cruikshank* v. *Robarts* (1821), 6 Madd. 104 (refusal to interfere where there is a foreign judgment, and the foreign court is able to secure the property out of which satisfaction is to be made).

(*g*) See Dicey, Conflict of Laws, 2nd ed., pp. 708 *et seq.*; Foote, Private International Jurisprudence, 3rd ed., p. 509; Westlake, Private International Law, 4th ed., pp. 390 *et seq.*; *De la Vega* v. *Vianna* (1830), 1 B. & Ad. 284: "A person suing in this country must take the law as he finds it" (*per* Lord TENTERDEN, C.J., at p. 288); *Don* v. *Lippmann* (1837), 5 Cl. & Fin. 1, *per* Lord BROUGHAM, at p. 13, H. L.; *General Steam Navigation Co.* v. *Guillou* (1843), 11 M. & W. 877, *per* PARKE, B., at p. 895; *Leroux* v. *Brown* (1852), 12 C. B. 801; *Hansen* v. *Dixon* (1906), 96 L. T. 32. See also *Huber* v. *Steiner* (1835), 2 Scott, 304, *per* TINDAL, C.J., at p. 326; *British Linen Co.* v. *Drummond* (1830), 10 B. & C. 903;

Parties to the action.

proper person to sue as plaintiff (*h*), unless the plaintiff claims to sue under a substantive title acquired in another country (*i*); and will also be decisive as to the parties sued (*k*), subject to this qualification, that no person can be fixed with liability by the rules of procedure of the *lex fori* who is not also liable by the proper law governing the matter in dispute (*l*). Thus, where a colonial statute enacted that a colonial banking company might be sued in the name of its chairman, but that execution might issue on a judgment so obtained against any individual proprietor, it was held that, since the statute imposed no new liability upon any proprietor, but only regulated the mode in which his liability should be judicially constituted, an action lay in England both against a proprietor direct (*m*) and also on a judgment obtained against the chairman of the company in the colony according to the provisions of the colonial law (*n*).

A defendant cannot in any circumstances put forward the provisions of a foreign law requiring proceedings to be brought

and compare *Hullet & Co.* v. *King of Spain* (1828), 1 Dow & Cl. 169, H. L.; *Rothschild* v. *Queen of Portugal* (1839), 3 Y. & C. (EX.) 554.

(*h*) See Foote, Private International Jurisprudence, 3rd ed., pp. 510, 511; *Folliott* v. *Ogden* (1789), 1 Hy. Bl. 124 (assignee of a foreign bond held not entitled to sue in England); *Wolff* v. *Oxholm* (1817), 6 M. & S. 92: "The assignee could not sue in the courts of this country in his own name; the action must have been brought in the name of the original creditors, even if they have assigned the debt for a valuable consideration" (*per* Lord ELLENBOROUGH, C.J., at p. 99); *Jeffery* v. *M'Taggart* (1817), 6 M. & S. 126 (trustee under a Scotch bankruptcy held not entitled to sue in his own name for a chose in action). See, however, *Innes* v. *Dunlop* (*Bart.*) (1800), 8 Term Rep. 595. These cases are not, of course, of any authority at the present day for the point actually decided in them, but are illustrations of the general principle with regard to parties to an action and the *lex fori*. In *Barber* v. *Mexican Land and Colonisation Co., Ltd.* (1900), 16 T. L. R. 127, an order of an American court authorising the plaintiff to sue on a judgment obtained abroad against a company was held *ultra vires* so far as it purported to confer a right to sue in England.

(*i*) See *Alivon* v. *Furnival* (1834), 1 Cr. M. & R. 277, where two out of three syndics in a French bankruptcy were allowed to sue in England on it appearing that they would be entitled to do so by the law of France, although the property of the bankrupt was not wholly vested in them, and they acted as agents or mandatories for the creditors. The line dividing the two classes of case is sometimes difficult to draw. Compare *Innes* v. *Dunlop* (*Bart.*), *supra*. For cases as to trustees in bankruptcy suing in England, see *Re Hayward, Hayward* v. *Hayward*, [1897] 1 Ch. 905 (trustee in foreign bankruptcy not entitled to sue where bankrupt domiciled in England at date of bankruptcy); *Re Davidson's Settlement Trusts* (1873), L. R. 15 Eq. 383 (*secus* where bankrupt voluntarily became bankrupt); *Re Lawson's Trusts*, [1896] 1 Ch. 175 (the same). As to title of trustee under foreign deed of assignment, see *Dulaney* v. *Merry & Son*, [1901] 1 K. B. 536.

(*k*) *General Steam Navigation Co.* v. *Guillou* (1843), 11 M. & W. 877; *Bank of Australasia* v. *Harding* (1850), 9 C. B. 661; *Kelsall* v. *Marshall* (1856), 1 C. B. (N. S.) 241; *Bullock* v. *Caird* (1875), L. R. 10 Q. B. 276; *Re Doetsch, Matheson* v. *Ludwig*, [1896] 2 Ch. 836. In *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717, the defendant had in effect contracted to permit actions on judgments obtained abroad against another person to be brought against him.

(*l*) *Bank of Australasia* v. *Harding*, *supra*; *Bank of Australasia* v. *Nias*, *supra*; *Kelsall* v. *Marshall*, *supra*.

(*m*) *Bank of Australasia* v. *Harding*, *supra*: "Independently of the colonial Act, the defendant would have been liable in respect of the demand for which the defendant is now sued" (*per* WILDE, C.J., at p. 685). Compare *Kelsall* v. *Marshall*, *supra*.

(*n*) *Bank of Australasia* v. *Nias*, *supra*.

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against another person as a condition precedent to an action against himself. Such a plea affects the remedy available against him, and this being a matter of procedure only, is for the *lex fori* (*o*).

The shareholders of an English limited company carrying on business in a foreign country by the laws of which their liability is increased, and a right of action given against them individually, cannot be made liable in England beyond the amount of their shares in an action by a foreign creditor in respect of a debt contracted by the company in the foreign country (*p*).

Application of *lex fori*.

448. All matters relating to the method of trial, the remedy sought, to process generally, and to execution after judgment, are for the *lex fori* (*q*). So, for example, the right to arrest for debt is governed by the *lex fori*, though the proper law governing the contract may give no such right (*r*), and so, also, is the right to a jury (*s*). Nor can the process of a foreign court be impeached if a plaintiff in a foreign suit is entitled to make use of it, even though in the result the decision of the foreign court is open to the reproach of injustice (*t*).

Priorities of creditors.

Questions of priorities among creditors affect the remedy available to them against the assets of a bankrupt, and so are to be decided by the *lex fori*, that is the law of the country where the bankruptcy, winding-up, or administration takes place (*a*).

(*o*) *Re Doetsch, Matheson* v. *Ludwig*, [1896] 2 Ch. 836 (suit for administration of separate estate of insolvent partner by foreign creditors and plea that by foreign law the joint estate ought first to be exhausted: *held*, no defence); *Bullock* v. *Caird* (1875), L. R. 10 Q. B. 276 (action against partner in Scotch form for damages for breach of contract and plea that Scotch law required judgment to be obtained against firm as condition precedent to action against individual partners: *held*, no defence). Compare also *Kelsall* v. *Marshall* (1856), 1 C. B. (N. S.) 241.

(*p*) See *Risdon Iron and Locomotive Works* v. *Furness*, [1906] 1 K. B. 49, C. A. The decision is also based on the ground that, even if the liability of the shareholders in California was by Californian law extended beyond the amount of their shares, and they were liable to be sued individually, yet there was no evidence of any authority, express or implied, given by the defendant to the company to contract the debt sued upon.

(*q*) *Imlay* v. *Ellefsen* (1802), 2 East, 453; *De la Vega* v. *Vianna* (1830), 1 B. & Ad. 284; *Don* v. *Lippmann* (1837), 5 Cl. & Fin. 1, H. L.; *Ferguson* v. *Fyffe* (1841), 8 Cl. & Fin. 121, H. L. Compare *Pardo* v. *Bingham* (1868), L. R. 6 Eq. 485; *Liverpool Marine Credit Co.* v. *Hunter* (1868), 3 Ch. App. 479; *Flack* v. *Holm* (1820), 1 Jac. & W. 405 (motion to discharge a writ *ne exeat regno*, the defendant being a Russian only temporarily resident in England, refused by Lord ELDON, although affidavits filed that no such process existed in Russia).

(*r*) *Imlay* v. *Ellefsen*, *supra*; *De la Vega* v. *Vianna*, *supra*: "A person suing in this country . . . cannot by virtue of any reputation in his own country enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer" (*per* Lord TENTERDEN, C.J., at p. 288). Compare *Talleyrand* v. *Boulanger* (1797), 3 Ves. 447, as explained by Lord CHELMSFORD, C., in *Liverpool Marine Credit Co.* v. *Hunter*, *supra*, at p. 486; *Brettillot* v. *Sandos* (1837), 4 Scott, 201.

(*s*) Compare remarks of Lord BROUGHAM in *Don* v. *Lippmann*, *supra*, at pp. 14, 15.

(*t*) See *Liverpool Marine Credit Co.* v. *Hunter*, *supra*; "It is impossible for the plaintiffs to establish that the ship was unlawfully seized, as it was done under process in actions which the defendants were entitled to bring," *per* Lord CHELMSFORD, at p. 487.

(*a*) *Pardo* v. *Bingham*, *supra* (no right of foreign creditor to have payment

Condition precedent.

449. The right to sue in England a person against whom the proper law governing the obligation which gives rise to the action affords no remedy, unless and until proceedings have been first taken against another, has been considered above in connection with the parties to an action, but illustrates the general principle as to the law which determines the nature and extent of a plaintiff's remedy (*b*). So, too, an action may be available in England against a defendant for breach of an obligation entered into abroad, which, though it is valid and subsisting, yet is, by reason of the particular circumstances, not actionable at all by the foreign law (*c*).

Gaming and wagering.

In so far as the Gaming Act, 1845 (*d*), enacts that no suit shall be brought to recover any sum of money or valuable thing alleged to have been won upon any wager, it is a statute affecting procedure, and therefore no action lies in England for money won upon a wager in a foreign country, even though by the law of that country the wager is lawful (*e*).

Damages.

450. Though in actions for breach of contract the proper law of the contract (*f*) and in actions of tort the *lex loci actus* (*g*) are generally decisive as to the measure of damages, yet in certain cases the rules of English law, as the *lex fori*, will permit or require damages to be calculated in accordance with principles perhaps not recognised by the foreign law. Such special rules relating to damages are in the nature of rules of procedure, and the *lex fori* will in such a case override all other relevant laws (*h*).

made to him out of equitable assets administered in England in priority to other creditors, though he would have been so entitled by the *lex loci contractus*); compare *Re Melbourn, Ex parte Melbourn* (1870), 6 Ch. App. 64; *Thurburn* v. *Steward* (1871), L. R. 3 P. C. 478.

(*b*) See *Bullock* v. *Caird* (1875), L. R. 10 Q. B. 276; *Re Doetsch, Matheson* v. *Ludwig*, [1896] 2 Ch. 836.

(*c*) See *Hansen* v. *Dixon* (1906), 96 L. T. 32 (action for breach of promise of marriage made in Denmark, the promise being valid in Denmark, but in the particular circumstances of the case not enforceable there). For the converse case, see *Leroux* v. *Brown* (1852), 12 C. B. 801.

(*d*) 8 & 9 Vict. c. 109, s. 18. Compare also the Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1; and see title GAMING AND WAGERING.

(*e*) See *per* COLLINS, M.R., in *Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A., at p. 753, citing Dicey, Conflict of Laws, 1st ed., p. 556, and compare *Saxby* v. *Fulton* (1908), 24 T. L. R. 856; and see title GAMING AND WAGERING. As to whether the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), is a statute affecting procedure, see Dicey, Conflict of Laws, 2nd ed., p. 711, note 4, *semble*, that it is not.

(*f*) See p. 247, *ante*.

(*g*) See p. 250, *ante*.

(*h*) This qualification does not appear to have been laid down in terms in any decided case or by the authorities, but it is submitted that it represents the law. Thus, in an action in England on a foreign judgment, no interest can be recovered as such, even though by the law of the country where the judgment was pronounced it is payable; but it can be recovered in the shape of damages (*Doran* v. *O'Reilly* (1816), 3 Price, 250, Ex. Ch.; compare *Bann* v. *Dalzell* (1828), 3 C. & P. 376; *M'Clure* v. *Dunkin* (1801), 1 East, 436). *Baschet* v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73, seems to recognise the rule as set forth in the text; see *per* KEKEWICH, J., at p. 78; and compare *The Circe*, [1906] P. 1. Wharton, Conflict of Laws, 3rd ed., paragraph 512, says: "According to Judge Story, the law which determines what interest is due determines what is to be the assessment of damages. On the other hand, there is a line of cases tending to show that that which is *processual*, and partakes

PART XI. Procedure.

Questions of set-off are matters of procedure, and are determined by the *lex fori* (*i*).

Statutes of Limitation.

Statutes of Limitation, unless affecting immovables, in so far as they bar the remedy of a plaintiff, are statutes relating to procedure (*k*); but where, by the proper law governing the transaction in respect of which an action is brought, a Statute of Limitations operates not only to bar the remedy, but also to extinguish the right, the rules of the *lex fori* have no application (*l*). A plaintiff may therefore sue upon a French contract in England, at any time within six years from the accrual of his right of action (*m*), even though his remedy may be barred in France, unless the French law has extinguished his rights under the contract also (*n*), and the converse case equally holds good.

An action on a foreign specialty debt is not barred for a period of twenty years (*o*), though the foreign law may not distinguish between specialty and simple contract debts (*p*).

Realty.

The Statutes of Limitation applicable to immovables are those of the *lex situs* (*q*), whether the action is for the recovery of the land itself (*r*), or, for example, of an annuity charged upon the land (*s*).

Extended judgments.

A Scotch judgment extended to England under the Judgments Extension Act, 1868 (*t*), may nevertheless be executed in England,

of the character of special damages imposed by the court of process, is governed by the *lex fori*."

(*i*) *Meyer* v. *Dresser* (1864), 16 C. B. (N. S.) 646: "The set-off being admitted to be a matter of procedure, we cannot introduce a case of set-off from the Prussian law simply because the contract sued on is a Prussian 'contract'" (*per* WILLES, J., at p. 665); see also *Rouquette* v. *Overmann* (1875), L. R. 10 Q. B. 525, *per* COCKBURN, C.J., at p. 541, explaining *Allen* v. *Kemble* (1848), 6 Moo. P. C. C. 314 (*compensatio* under Roman-Dutch law in Demerara); *Maspons y Hermano* v. *Mildred* (1882), 9 Q. B. D. 530, C. A. *Macfarlane* v. *Norris* (1862), 2 B. & S. 783, is not really a case of set-off at all.

(*k*) *Huber* v. *Steiner* (1835), 2 Bing. (N. C.) 202, approved in *Don* v. *Lippmann* (1837), 5 Cl. & Fin. 1, H. L., at p. 16; *Lopez* v. *Burslem* (1843), 4 Moo. P. C. C. 300; *Ruckmaboye* (*H. H.*) v. *Lulloobhoy Mottichund* (1852), 8 Moo. P. C. C. 4 ("In truth it has become almost an axiom in jurisprudence that a law of prescription or law of limitation, which is meant by that denomination, is a law relating to procedure having reference only to the *lex fori*," *per* Sir JOHN JERVIS, at pp. 35, 36); *Pardo* v. *Bingham* (1869), 4 Ch. App. 735; *Harris* v. *Quine* (1869), L. R. 4 Q. B. 653.

(*l*) *Huber* v. *Steiner*, *supra*. See also *Harris* v. *Quine*, *supra*, at p. 654.

(*m*) Limitation Act, 1623 (21 Jac. 1, c. 16).

(*n*) *Huber* v. *Steiner*, *supra*.

(*o*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3.

(*p*) *Alliance Bank of Simla* v. *Carey* (1880), 5 C. P. D. 429 ("The document is under seal. The English court cannot ignore this, and must give to it the effect that in this country belongs to it," *per* LOPES, J., at p. 430). Mr. Dicey doubts the correctness of this decision (Conflict of Laws, 2nd ed., p. 713, note 4).

(*q*) *Beckford* v. *Wade* (1805), 17 Ves. 87, P. C.; *Re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Pitt* v. *Ducre* (*Lord*) (1876), 3 Ch. D. 295. Compare *Harris* v. *Quine*, *supra*, at p. 654.

(*r*) *Re Peat's Trusts*, *supra*. The Indian Act (No. 14 of 1859) which was relied on in this case was, it seems, one which barred the remedy only and did not extinguish the title to the land. See, however, Part IV., p. 199, *ante*.

(*s*) *Pitt* v. *Ducre* (*Lord*), *supra*; and see, generally, title LIMITATION OF ACTIONS.

(*t*) 31 & 32 Vict. c. 54, s. 3.

even though the debt in respect of which it was obtained is barred by the English Statute of Limitations (*a*).

Extent of extinguishment.

Where an English Statute of Limitations merely bars a plaintiff's right of action, but does not extinguish the obligation in respect of which the action is brought, the English court will not refuse to recognise the existence of the obligation for other purposes, as, for example, creating a lien (*b*).

Appeals.

The *lex fori* will, on the same principle, determine the period in which any appeal may be entered (*c*).

Evidence.

451. All questions relating to evidence, such as the competence of witnesses and the methods or sufficiency of proof, are matters of procedure (*d*). No action is therefore maintainable in England on a contract made abroad and valid and enforceable by the foreign law, if the proof required by English law is wanting, as, for example, the note or memorandum required by the Statute of Frauds (*e*); and conversely, a contract unenforceable abroad may be sued upon in England, if the necessary evidence be forthcoming (*f*).

Documentary evidence.

It is not sufficient, therefore, to prove a foreign document by evidence which would be accepted in the foreign court—the rules of English law must be observed (*g*); nor may facts which occur in a foreign country be proved by documentary evidence admissible by the law of that country unless also admissible by English law (*h*).

Unstamped documents.

452. A document inadmissible by the foreign law for want of a

(*a*) *Re Low, Bland* v. *Low*, [1894] 1 Ch. 147, C. A. The extension and registration of the judgment creates a new cause of action (*ibid.*).

(*b*) See *Re Bowes, Strathmore (Earl)* v. *Vane*, [1889] W. N. 53; Foote, Private International Jurisprudence 3rd ed., pp. 518, 519. In this case a creditor in an administration action who had attached assets in France in respect of a debt owing to her there, which was barred by an English Statute of Limitations, was not compelled to bring into hotchpot or account for the proceeds of her security in France before receiving a dividend in respect of other sums owing to her. Compare Lord ELDON'S remarks in *Spears* v. *Hartley* (1800), 3 Esp. 81, at p. 82: "Though the Statute of Limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien."

(*c*) *Lopez* v. *Burslem* (1843), 4 Moo. P. C. C. 300.

(*d*) See *per* Lord BROUGHAM in *Bain* v. *Whitehaven and Furness Junction Rail. Co.* (1850), 3 H. L. Cas. 1, at p. 19. Compare *Brown* v. *Thornton* (1837), 6 Ad. & El. 185; *Leroux* v. *Brown* (1852), 12 C. B. 801, where all the authorities are discussed; *Finlay* v. *Finlay and Rudall* (1862), 31 L. J. (P. M. & A.) 149; *Hansen* v. *Dixon* (1906), 96 L. T. 32. It is necessary to distinguish carefully between proof and the facts to be proved. See *per* COTTON, L.J., in *The Gaetano and Maria* (1882), 7 P. D. 137, C. A., at p. 149; see also title EVIDENCE.

(*e*) 29 Car. 2, c. 3, s. 4. See *Leroux* v. *Brown, supra;* and compare *Acebal* v. *Levy* (1834), 10 Bing. 376; *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534.

(*f*) See *Hansen* v. *Dixon, supra* (action for breach of promise of marriage made in Denmark and valid and subsisting there, but owing to the special circumstances of the case unenforceable by action).

(*g*) *Brown* v. *Thornton, supra* (copy of a charterparty made in Batavia held inadmissible, though in certain circumstances it would have been admissible in the Batavian courts).

(*h*) *Finlay* v. *Finlay and Rudall* (1862), 31 L. J. (P. M. & A.) 149 (certificate of marriage in a foreign country which would have been evidence of the marriage by the foreign law held inadmissible in England as not being in accordance with English requirements); compare *Abbott* v. *Abbott and Godoy* (1860), 29 L. J. (P. M. & A.) 57.

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stamp may nevertheless be admissible in England, provided that the absence of the stamp does not by the foreign law render the document wholly null and void (*i*).

Evidence in foreign suits.

453. Where under the Foreign Tribunals Evidence Act, 1856 (*k*), an order has been made for the examination on oath of a witness in a foreign suit, although the evidence itself can only be taken in the English mode, the English rules of evidence do not apply (*l*).

(*i*) *Alves* v. *Hodgson* (1797), 7 Term Rep. 241 (promissory note void by foreign law for want of stamp and held not receivable in evidence in England); *Bristow* v. *Sequeville* (1850), 5 Exch. 275 (receipt inadmissible by evidence as foreign law, but not void and held admissible in England); see also *Clegg* v. *Levy* (1812), 3 Camp. 166; *James* v. *Catherwood* (1823), 3 Dow. & Ry. (K. B.) 190; *Wynne* v. *Jackson* (1826), 2 Russ. 351. The earlier cases were discussed in *Alves* v. *Hodgson*, *supra*; Lord KENYON, C.J., said (at p. 243): "It is said that we cannot take notice of the revenue laws of a foreign country" (the *ratio decidendi* in *James* v. *Catherwood*, *supra*), "but I think we must resort to the laws of the country in which the note was made, and unless it is good there it is not obligatory in a Court of Law here." And in *Bristow* v. *Sequeville*, *supra*, ROLFE, B., remarked (at p. 279) that if *Alves* v. *Hodgson*, *supra*, "meant to decide that where a stamp is required by the revenue laws of a foreign State before the document can be received in evidence there, it is inadmissible in this country, I entirely disagree." The learned Baron's judgment clearly shows that he thought the case decided nothing of the kind; compare, for the distinction between the *lex loci* and the *lex fori*, *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403 (lease of Scotch shooting valid in Scotland without seal held actionable in England).

(*k*) 19 & 20 Vict. c. 113.

(*l*) *Desilla* v. *Fells & Co.* (1879), 40 L. T. 423.

CONFUSION OF GOODS.

See PERSONAL PROPERTY.

CONSIDERATION.

See CONTRACT.

CONSOLIDATION OF ACTIONS.

See PRACTICE AND PROCEDURE.

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See CRIMINAL LAW AND PROCEDURE; TORT; TRADE AND TRADE UNIONS.

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Part I.—Introduction.

Definition.

454. Constitutional law may be said to embrace all rules which directly or indirectly affect the distribution or exercise of the sovereign power in the State (*a*), and the relations which the component parts of the sovereign power bear towards each other and to the subject.

Whence derived.

455. As legally enforceable by the courts, the law of the English constitution is to be sought, not in any particular written document, but from the ordinary sources from which the substantive law of the land is derived, namely, Acts of Parliament, or *quasi* Acts of Parliament (*b*), and the rules and orders made thereunder; prerogative rules and orders made and issued by the Crown, acting in exercise of the power intrusted to it by virtue of the common law, and embodied in Orders in Council, treaties (*c*), charters, proclamations relating to the Colonies (*d*), and other executive documents (*e*); and the common law, which is largely embodied in judicial decisions (*f*).

(*a*) See Dicey, Law of the Constitution, 7th ed., p. 22

(*b*) Magna Carta, the Petition of Rights, 1627 (3 Car. 1, c. 1), the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), and the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), being in the nature of solemn compacts between the Sovereign and people, are usually designated *quasi*-statutes.

(*c*) Agreements or treaties embodied in statutes, as the Union with Scotland and Ireland Acts, are usually designated *quasi*-treaties.

(*d*) See p. 421, *post*, and Vol. VII., Part VI., as to the legal use of proclamations.

(*e*) See Vol. VII., Part VI., as to executive documents generally.

(*f*) *E.g.*, *Bushell's Case* (1670), 6 State Tr. 999, establishing the independence of juries; *Hamond* v. *Howell* (1677), 2 Mod. Rep. 218, establishing the immunity of judges.

Conventional usage.

456. Much of the recognised practice of the constitution depends, however, not upon substantive law as enforceable by the courts, but upon conventional usage and the precedents afforded by history, which may be said for practical purposes of government to have acquired the force of customary law. The rules and principles embodied in these conventional usages have been found from experience to be essential to the harmonious co-operation of the three parties in whom the legislative and executive functions of government are vested—namely, the Crown, the Lords, and the Commons—and are mainly directed towards securing the ascendency of the House of Commons, and ultimately of the electorate whom it represents, as the predominant power in the State, or political sovereign.

The recognised conventional rules relate, for the most part, to the conduct of the executive, and are concerned with the formation and dissolution of the Ministry and the Cabinet, in whom, as representing the Crown, the executive government is vested. They are enforced by the House of Commons, which is the arbiter of the constitutionality or unconstitutionality of any particular executive act, by the penalties of censure or loss of office; and breach of their observance, if persisted in, must eventually lead to a rupture with the House of Commons and a subsequent breach of substantive law, thus rendering the perpetrators of unconstitutional acts liable to be condemned as the result either of an impeachment or of ordinary criminal or civil proceedings.

Government.

457. The sovereign power, or government of the country, comprises the legislature, or body which makes the laws, the executive, or authority which carries the laws into effect so far as they relate to the public services, and the judiciary, which enforces the due observance of the law.

Parliament.

458. The legislative power is vested in the Crown in Council in Parliament (*g*), the three parties necessary to legislation being the Crown, the Lords Spiritual and Temporal, and the Commons. Apart from the independent and concurrent powers which the Crown enjoys of legislating by Order in Council or proclamation in conquered, ceded, and settled colonies to which representative institutions have not been granted (*h*), no other power in the State except Parliament can make laws, unless the authority to do so has been conferred either mediately or immediately by Parliament (*i*).

The power of legislation thus vested in Parliament is unlimited, apart from the restrictions imposed by its own sense of fitness, and the sense of fitness of the electorate, to whose wishes the Commons,

(*g*) See title PARLIAMENT.

(*h*) See p. 423, *post*, and title DEPENDENCIES AND COLONIES.

(*i*) As in the case of bye-laws made by municipal corporations (see the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23, and title LOCAL GOVERNMENT), and some public companies incorporated by statute (*e.g.*, railway companies). As to the power of the Crown at common law to create corporations with authority to make bye-laws, see p. 388, *post*, and title CORPORATIONS. The Crown cannot legislate by proclamation, nor can either House of Parliament legislate on its own authority (see p. 388, *post*).

PART I. Introduction.

and Parliament itself, are bound eventually to submit. There is thus no law which Parliament cannot make or unmake, whether relating to the constitution itself or otherwise (*k*); there is no necessity, as in States whose constitutions are drawn up in a fixed and rigid form and contained in written documents, for the existence of a judicial body to determine whether any particular legislative act is within the constitutional powers of Parliament or not; and laws affecting the constitution itself may be enacted with the same ease, and subject to the same procedure, as ordinary laws.

The Executive.

459. The executive authority is vested in the Crown as part of the prerogative. The person of the Sovereign is (except by particular process granted as of grace and not as of right), in general, outside and above the reach of the law (*l*), though he is bound by the terms of the oath, which every Sovereign is required to take at his coronation, to obey and observe the law (*m*). But the prerogative is subject to the law, and, under the conventional rules relating to the ministerial and cabinet system, there is no executive act of the Crown for which some Minister, or the Ministry collectively, cannot be made responsible, either in a court of law in the case of illegal acts, or to Parliament itself in the case of misgovernment (*n*). The strength and efficiency of an unfettered executive authority is thus combined with a proper sense of responsibility, and the possibility of misrule is minimised.

The Judiciary.

460. The judicial authority is vested under the Sovereign in the judges of the Supreme Court, of the county courts, and of some minor courts, and in the various stipendiary and police magistrates and justices of the peace; the ultimate appellate jurisdiction remains with the House of Lords or the Judicial Committee of the Privy Council (*o*). The judges of the Supreme Court are appointed by the Crown, and hold office during good behaviour, subject to a power of removal by the Crown on an address presented by both Houses of Parliament (*p*). They are, moreover, exempted from liability

(*k*) Acts of Parliament cannot curtail the powers of future Parliaments, since it is a maxim of the common law that "Acts derogatory to the power of subsequent Parliaments bind not"; see 1 Bl. Com., 1st ed., 160; see also the Irish Church Act, 1869 (32 & 33 Vict. c. 42), disestablishing the Irish Church, though the maintenance of the Established Church in Ireland was made a fundamental term of the Union (Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67)). By the Septennial Act, 1715 (1 Geo. 1, stat. 2, c. 38), Parliament prolonged its own life to seven years; and Parliament may bind and limit the succession to the Crown (see the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), and p. 323, *post*).

(*l*) See p. 373, *post;* and, as to proceedings by petition of right, title CROWN PRACTICE. As to suits relating to Crown private estates, see p. 413, *post*. As to suits relating to the Duchy of Cornwall, see p. 413, *post*, and Vol. VII., Part VII., sect. 4.

(*m*) See p. 338, *post*.

(*n*) See p. 386, *post*, and, as to the liability of Government officers and departments generally, p. 383, *post*.

(*o*) See title COURTS.

(*p*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5. See also p. 400, *post;* and as to tenure of office during good behaviour, see Vol. VII., Part VI., sect. 1. As to tenure of other judges, see titles COUNTY COURTS; COURTS; MAGISTRATES.

for all acts done in their official capacity within their jurisdiction (*q*), thus ensuring the distribution of impartial and unpolluted justice.

Liberty of the subject.

461. Apart from the general provisions ensuring the peaceful enjoyment of rights of property, and the freedom of the subject from illegal detention, duress, punishment, or taxation, contained in the four great charters or statutes which regulate the relations between the Crown and people (*r*), the liberties of the subject are not expressly defined in any law or code, and provided he does not transgress the substantive law, or infringe the legal rights of others, he may say or do what he pleases (*s*).

The freedom of the subject to act as he pleases, provided he keeps within the law, and his immunity from wrongful detention or confinement are ensured by the Habeas Corpus Acts, under which, upon probable cause being shown by an affidavit, either of the prisoner himself or of some other person on his behalf, a writ may be obtained directing the person having charge of the prisoner to produce his body before the Court of King's Bench, in order that the reason of his detention may be inquired into (*t*).

Moreover, except in the case of the Sovereign, who can do no wrong in the eyes of the law, and whose person is inviolable (*a*), and excepting, too, the protection afforded to the judiciary whilst acting in their official capacity (*b*), the limited protection afforded

(*q*) *Hamond* v. *Howell* (1677), 2 Mod. Rep. 218, and see p. 416, *post*. This exemption extends to cases in which they have acted *bonâ fide* but mistakenly in excess of jurisdiction; see *Calder* v. *Halket* (1839), 3 Moo. P. C. C. 28, and p. 416, *post*.

(*r*) Namely, Magna Carta, the Petition of Right, 1627 (3 Car. 1, c. 1), the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), and the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2); as to the provisions of these, see pp. 321, 377, *post*.

(*s*) The right to freedom of speech or discussion means that any person may write or say what he pleases, so long as he does not infringe the law relating to libel or slander (see title LIBEL AND SLANDER), or to blasphemous, obscene, or seditious words or writings (see title CRIMINAL LAW AND PROCEDURE). The right of public meeting means that any persons may meet together, so long as they do not thereby trespass upon private rights of property (see title TRESPASS), or commit a nuisance (see title NUISANCE), or infringe the law relating to public meetings and unlawful assemblies (see title CRIMINAL LAW AND PROCEDURE). The law does not recognise any place, such as Trafalgar Square, as a public forum; and, the streets being open to all to use for purposes of traffic, any person who holds meetings or otherwise obstructs the rights of the public commits a nuisance for which he may be fined (see *Ex parte Lewis* (1888), 21 Q. B. D. 191, *per* WILLS, J., at p. 197). A meeting to carry out a lawful purpose in a lawful manner, though it may cause others to break the peace, is not an unlawful assembly (*Beatty* v. *Gillbanks* (1882), 9 Q. B. D. 308). But it is otherwise if there is an intention to provoke a breach of the peace, and, perhaps, if, owing to the character of the meeting and of the locality where it is proposed to be held, there is a clear probability that a breach of the peace will be provoked; see *Wise* v. *Dunning*, [1902] 1 K. B. 167, as to holding meetings adverse to Roman Catholics in a district largely inhabited by the latter; and see title CRIMINAL LAW AND PROCEDURE.

(*t*) See the Habeas Corpus Acts, 1640, 1679, 1803, and 1816 (16 Car. 1, c. 10, s. 6; 31 Car. 2, c. 2; 43 Geo. 3, c. 140; 56 Geo. 3, c. 100), and title CROWN PRACTICE.

(*a*) See pp. 373, 374, *post*.

(*b*) See p. 416, *post*.

PART I. Introduction.

to magistrates and justices of the peace (*c*), and the special rules relating to breaches of contract by servants of the Crown, and wrongs by public officers (*d*), all persons are equally subject to the jurisdiction of the courts, and may be made liable for any infringement of the rights and liberties of others.

Part II.—The Title to the Crown.

SECT. 1.—*At Common Law.*

The descent of the Crown.

462. At common law the title to the Crown of England was governed by the feudal rules of hereditary descent formerly applicable to land (*e*), subject to the distinctions that in the case of females the title devolved upon the eldest daughter alone and her issue (*f*); and that the ancient doctrines relating to the exclusion of the half-blood from the inheritance had no application (*g*). In the absence of statutory limitations, therefore, the Crown would descend lineally to the issue of the reigning sovereign (*h*), males being preferred to females, and subject to the right of primogeniture amongst both males and females of equal degree, whilst children would represent their deceased ancestors *per stirpes in infinitum* (*i*). Upon failure of lineal descendants, the Crown would pass under the rule to the nearest collateral relation descended from the blood royal (*k*).

(*c*) Under the Justices Protection Act, 1848 (11 & 12 Vict. c. 44); and see p. 416, *post*, and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*d*) See the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*e*) This is the substance of the rule as deduced by Blackstone in his commentaries (see 1 Bl. Com., 14th ed., 192, 193); but the principal authority for the existence of the rule is to be found in the course of descent in the past, and in the fact that where the rule has been broken through, or where any doubt as to the validity of the title has existed, it has usually been found necessary to fortify the title by statute. See the statutes 7 Hen. 4, c. 2; 1 Mar. sess. 2, c. 1; 1 Eliz. c. 3; 1 Jac. 1, c. 1; 6 Ann. c. 41 (c. 7, Ruff.). As to the present title, which depends primarily upon statute, see p. 321, *post*. For the laws of descent of land, see titles DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

(*f*) 1 Bl. Com., 14th ed. (by Christian, 1803), 193. Whereas, in the case of land, the title devolves upon all the daughters equally as coparceners. See title REAL PROPERTY AND CHATTELS REAL.

(*g*) See note (*k*), *infra*.

(*h*) It was expressly declared by the statute 25 Edw. 3, stat. 1 (stat. 2, Ruff.), that "the law of the Crown of England is and always hath been such that the children of the Kings of England, in whatsoever parts they be born, in England or elsewhere, be able and ought to bear the inheritance after the death of their ancestors."

(*i*) 1 Bl. Com., 14th ed., 193.

(*k*) There can be no doubt that the ancient doctrines with regard to land, relating to the exclusion of the half-blood from the inheritance, never had any application to the descent of the Crown, and that collaterals were always admitted provided they could trace descent from the first monarch purchaser (1 Bl. Com., 14th ed., 232; Bac. Abr. tit. Prerog. A; *Willion* v. *Berkley* (1561),

SECT. 2.—*Under Statute.*

SECT. 2. Under Statute.

463. The common law right of inheritance is, however, liable to be defeated by parliamentary grant, the power of the Crown and Parliament to limit and bind the succession having been expressly affirmed by statute (*l*).

Power of Parliament to limit descent of Crown.

Moreover, though the right of the two Houses of Parliament to vary and limit the descent of the Crown, in cases of misgovernment amounting to a breach of the original contract between the Crown and people, cannot be said to be admitted as a definite constitutional principle (*m*), due weight must be attributed to the fact that the tenure of the Crown since the year 1688 has depended primarily upon the action taken by the Lords and Commons convened in an irregular manner (*n*).

Plowd. 223, 245; Co. Litt. 15 b). Thus, the Crown actually did descend from Edward VI. to Mary, and from the latter to Elizabeth, though this instance is not conclusive, because the descent was regulated by statute 35 Hen. 8, c. 1. It is also said that the maxim *Possessio fratris hæredem facit sororem* does not apply to the descent of the Crown, and that, therefore, in the absence of lineal issue, the brother of the half-blood may succeed in preference to the sister of the whole blood; see Co. Litt. 15 b.

(*l*) See the Succession to the Crown Act, 1707 (6 Ann. c. 41), ss. 1—3 (6 Ann. c. 7, Ruff.). As to the offences which are punishable, either as high treason, or with the penalty of a *præmunire* under this Act, see pp. 323, 350, *post*.

(*m*) The title to the Crown was originally elective, and the notion of hereditary right grew gradually. What survives of the elective principle is still to be seen in the terms of the coronation ceremony (see p. 326, *post*). Freeman says: "We have never cast wholly aside either the hereditary or the elective principle: our Sovereign is still crowned and announced with the same rites as Edward, Harold and William" (Freeman, Comparative Politics, 178).

(*n*) The procedure on this occasion was as follows:—On the flight of James II. in 1688, all those who had served as members of the Parliaments of Charles II., together with the Court of Aldermen and members of the Common Council of the city of London, assembled on the 26th December, 1688, at the desire of the Prince of Orange, and requested the latter to take over the civil and military administration and the disposal of the public revenue, and likewise to summon a Convention Parliament (Commons' Journ., 26th December, 1688). A Convention Parliament was accordingly summoned by the Prince of Orange by letters directed to the Lords Spiritual and Temporal, being Protestants, and to the coroners, clerks of the peace, and others. This Convention Parliament met on the 22nd January, 1688, O. S., 1689, N. S. (see *infra* as to change of date) (Commons' Journals, 26th December, 1688; *ibid.*, 22nd January, 1688, O. S., 1689, N. S.). On the 28th January the Commons so convened resolved that "King James II. having endeavoured to subvert the constitution of the kingdom by breaking the original contract between the King and people and by the advice of Jesuits and other wicked persons having violated the fundamental laws; and having withdrawn himself out of this kingdom; has abdicated the government; and that the throne is thereby vacant" (*ibid.*, 28th January, 1688, O. S., 1689, N. S.). On the 12th February a declaration was drawn up and agreed to by the Lords and Commons affirming the rights and liberties of the people, and settling the Crown and regal government of England, France, and Ireland upon William and Mary of Orange, during their joint lives, and the life of the survivor of them; the further limitations being—(1) to the heirs of the body of Mary; (2) to the Princess Anne of Denmark and the heirs of her body; (3) to the heirs of the body of William, Prince of Orange. This declaration was offered on the following day to William and Mary, who accepted its terms, and the declaration was then published to the nation in the form of a proclamation (see *ibid.*, 12th February,

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In such a case the Crown descends according to the statutory limitations, but retaining its hereditary and descendible qualities as at common law, subject to the statutory provisions (*o*).

The present succession.

464. As from the dates of the Unions of England with Scotland and Ireland, the succession to the Imperial Crown of the United Kingdom of Great Britain, and of Great Britain and Ireland respectively, is to be as it then stood limited and settled under the Act of Settlement (*p*).

1688, O. S., 1689, N. S.; 13th February, 1688, O. S., 1689, N. S.). The declaration was subsequently enacted with certain additions in the form of the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), and the Acts of the Convention Parliament were subsequently ratified and confirmed by an Act of Recognition passed in 1690 (2 Will. & Mar. c. 1, (sess. 1, c. 1, Ruff.)), which also acknowledged the King and Queen. The Bill of Rights being thus confirmed by a Parliament summoned in the constitutional manner, acquired the force of a legal statute, and appears upon the statute books as such. The dates of the declaration as given above must be read subject to the change from the old style (Julian calendar) to the new style made by the Calendar (New Style) Act, 1750 (24 Geo. 2, c. 23), s. 1, by which, as from and after the last day of December, 1751, the legal commencement of the year was changed from the 25th March to the 1st January. See also title TIME.

(*o*) It was provided in the year 1700 that the Princess Sophia, Electress and Duchess Dowager of Hanover, daughter of the Princess Elizabeth, Queen of Bohemia, daughter of James I., should be the next in succession in the Protestant line to the Imperial Crown and dignity of the realms of England, France, and Ireland, with the dominions and territories thereunto belonging, in default of the issue of the Princess Anne of Denmark (subsequently Queen Anne) and of William III., and that the Crown and regal government of the said kingdoms, with the royal state and dignity of the said realms, and all honours, styles, titles, regalities, prerogatives, powers, jurisdiction and authorities to the same belonging and appertaining, should be, remain, and continue to the said Princess Sophia and the heirs of her body, being Protestants (Act of Settlement, 1700 (12 & 13 Will. 3, c. 2)). On the death of Queen Anne in the year 1714 leaving no issue these statutory limitations took effect in the heir of Sophia, and the Crown is now held thereunder. As to the claim of Edward III. to the Crown of France and the eventual abandonment of the title, see note (*c*), p. 361, *post*.

The Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), was rendered necessary by the probability of the failure of the limitations (see note (*n*), p. 321, *ante*) of the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), on the death of William III. and the Princess Anne of Denmark without heirs of their bodies, since Mary was then dead (having left no issue), William III. in a dying condition, and the Princess Anne past the age of child-bearing, all her children having predeceased her. The Bill of Rights passed over James II. and his son James Edward in the direct line of descent from the Conqueror. In addition to the issue of James II., the Act of Settlement passed over Charles Lewis and Edward, brothers of Sophia, and also the issue of Henrietta, daughter of Charles I., in whom the true right by descent became vested on the extinction of the descendants of James II. in 1807 (see Bailey's Succession to the English Crown, 233). The Princess Sophia having predeceased Anne, the Crown descended, under the provisions in the text above, to George I., son of Sophia. From George I. the Crown descended lineally to George IV., from the latter to his brother William IV., from whom it descended to Queen Victoria, niece of William IV., and lastly, in 1901, to His present Majesty King Edward VII., eldest son of Queen Victoria.

(*p*) Union with Scotland Act, 1706 (5 & 6 Ann. c. 11; 6 Ann. c. 8, Ruff.), art. 2; Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 2.

SECT. 3.—*Statutory Provisions securing the Succession.*

SECT. 3. Statutory Provisions securing the Succession.

465. The descent of the Crown in the present Protestant line is secured by certain statutory provisions as follows (*a*):

Under the Act of Settlement.

First, by the Act which regulates the succession (*b*), it is enacted that to the form of government so established the lords spiritual and temporal and commons shall and will, in the name of the people of the realm, most faithfully, fully, and humbly submit themselves, their heirs and posterities, and faithfully promise (*c*) to stand to, maintain, and defend the heirs of the body of the Princess Sophia (*d*), being Protestants, according to the limitation and succession of the Crown in the Act specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

Offence to deny title.

Secondly, it is an offence punishable with the penalty of a *præmunire*, mentioned in the statute relating thereto (*e*), maliciously and directly, by preaching, teaching, or advised speaking, to declare, maintain, and affirm (*f*) that any other person or persons has or have any right or title to the Crown of these realms otherwise than according to the Acts by which the succession is now regulated (*g*) and the Act for the union of England and Scotland, or that the kings or queens of this realm, with and by the authority of Parliament, are not able to make laws and statutes of

(*a*) These provisions are in addition to the law dealing with treason, as to which see pp. 345—359, *post*, and as to offences relating to the succession in particular, p. 350, *post*.

(*b*) The Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 1.

(*c*) The words of the Act which follow here are "after the deceases of His Majesty and Her Royal Highness and the failure of the heirs of their respective bodies." This refers to the decease of William III. and the Princess Anne of Denmark, subsequently Queen Anne.

(*d*) As to the further descent from Princess Sophia, see note (*o*), p. 322, *ante*.

(*e*) Stat. 16 Ric. 2, c. 5, s. 2, which refers to the Statute of Provisors, 1353 (27 Edw. 3, stat. 1, c. 1). The procedure by writ of *præmunire facias* was established by virtue of the latter Act, passed for the prevention of bringing suits out of the realm, or impeaching judgments given in the King's Court out of the realm. Under this statute persons were to be warned (*præmunire facias*) to appear on a certain day before the King and his council, or in his chancery, or before the King's justices of either bench, to answer for the contempt. On failure to appear on the day named the persons themselves, their procurators, attorneys, executors, notaries, and maintainors were to be put out of the King's protection, and their lands and goods and chattels were forfeited to the King, and their bodies, wheresoever found, were to be taken and imprisoned and ransomed at the King's will; and upon the same a writ was directed to be made to take them by their bodies, and to seize their lands, goods, and possessions into the King's hands; and if it were returned that they be not found, they were to be put in *exigent* and outlawed. The statute also provided that the forfeiture of the lands, goods, and chattels should take effect unless the defaulters appeared within two months to receive the judgment awarded by the court (*ibid.*, s. 2).

(*f*) The words which follow here in the Act (1707, 6 Ann. c. 41) relating to Queen Anne, and the then pretender to the throne under the name of James III., are no longer of any effect.

(*g*) Viz., the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2). The Act also names the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), but the provisions as to the line of succession in the latter Act are now obsolete, except in so far as they relate to the conditions to be observed (see p. 324, *post*).

SECT. 3. Statutory Provisions securing the Succession.

sufficient force and validity to limit and bind the Crown and the descent, limitation, inheritance, and government thereof (*h*). But no person may be convicted for any such words spoken but by the oaths of two credible witnesses, nor may he be prosecuted therefor unless the information of such words be given upon oath to one or more justice or justices of the peace within three days after the words spoken, and the prosecution of the offence be within three months after such information (*i*).

Certain offences relating directly to the maintenance of the present line of succession have also been rendered punishable under the law relating to treason (*k*).

SECT. 4.—*Statutory Conditions of Tenure.*

Under Act of Settlement.

466. The descent of the Crown in the present line of succession is subject to certain statutory conditions as follows:

(1) Any person who shall be reconciled to, or hold communion with, the see or Church of Rome, or profess the popish religion, or marry a Papist, is excluded from inheriting, possessing, or enjoying the Crown, and in such case the people are absolved of their allegiance, and the Crown is to descend to such person or persons, being Protestants, as would have inherited it in case the person so reconciled etc. were dead (*l*).

(2) Every person inheriting the Crown must take the coronation oath in the form provided by statute (*a*).

(3) Every king or queen must make, subscribe, and repeat the declaration against transubstantiation prescribed by the Bill of Rights, sitting on the throne in the House of Peers, either on the first day of the meeting of the first Parliament after the accession, or at the coronation, whichever shall first happen (*b*).

(*h*) Succession to the Crown Act, 1707 (6 Ann. c. 41, s. 2 (c. 7, s. 2, Ruff.)), s. 2.

(*i*) *Ibid.*, s. 3.

(*k*) See pp. 349, 350, *post*

(*l*) By the joint effect of the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 2, and the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), s. 9.

(*a*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 2. The form of the oath is provided by the Act for Establishing the Coronation Oath, 1688 (1 Will. & Mar. sess. 1, c. 6), s. 3, and must be administered by the Archbishop of Canterbury or York, or any other bishop of the realm appointed by the Sovereign for that purpose, in the presence of all persons attending, assisting, or otherwise present at the Coronation (*ibid.*, s. 4). The form of the oath as at present administered differs from that provided by the Act owing to the disestablishment of the Irish Church (see note (*d*) on p. 325, *post*), and to the provisions of the Union with Scotland Act, 1706 (6 Ann. c. 11; 5 & 6 Ann. c. 8, Ruff.), art. 25. See text, *post*, as to the oath for the preservation of the Established Church of England. For the form of oath as administered to His present Majesty, see Bodley's Coronation of Edward VII., p. 438, and p. 338, *post*.

(*b*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 2. The declaration is to be made in the form provided by the statute (1677), 30 Car. 2, stat. 2, c. 1. See the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), s. 10. The necessity for making the declaration is not affected by the repeal of the statute 30 Car. 2, stat. 2, c. 1, by the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 6, because the declaration itself is incorporated into the Bill of Rights. See Parl. Deb., 4th Ser., 1901, Vol. LXXXIX., p. 872. The declaration was made by

SECT. 4. Statutory Conditions of Tenure.

(4) Any person coming into possession of the Crown must join in communion with the Church of England (*c*).

(5) It is also provided as a fundamental term of the union of England with Scotland that every person who succeeds to the Crown must take and subscribe the oaths for the preservation of the Established Church in England and the Presbyterian Church in Scotland (*d*).

Under Union with Scotland Act.

SECT. 5.—*Accession.*

467. On the death of the reigning sovereign (*e*) the Crown vests immediately in the person who is entitled to succeed, it being a maxim of the common law that "the King never dies" (*f*). The new Sovereign is therefore entitled to exercise full prerogative rights without further ceremony, though the title cannot be said to be complete for all purposes until after coronation (*g*).

The King never dies.

The fact of the accession of the new Sovereign is published to the nation by a proclamation, which is issued as soon as conveniently may be after the death of the former Sovereign, by the lords spiritual and temporal, members of the late Sovereign's Privy

His present Majesty at the opening of Parliament, and therefore the necessity for making it at the coronation did not arise (*ibid.*, LXXXIX., p. 320).

(*c*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3.

(*d*) Union with Scotland Act, 1706 (6 Ann. c. 11; 5 & 6 Ann. c. 8, Ruff.), art. xxv., ss. 4, 8. The oath for the preservation of the Established Church of England is now administered as part of the coronation oath. See note (*a*), *supra*. The oath for the preservation of the Presbyterian Church was taken by His present Majesty at a meeting of the Privy Council held immediately after his accession, the instrument being subscribed in duplicate, and one part sent to the Court of Session to be recorded in the Books of Sederunt, and afterwards to be lodged in the Public Register of Scotland, the other part remaining among the records of the Council to be entered in the Council Book. See the Supplement to the *London Gazette* Extraordinary, 22nd January, 1901. By the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 5, the continuance and preservation of the United Established Church of England and Ireland was made an essential term of the union. The Irish Church was, however, disestablished by the Irish Church Act, 1869 (32 & 33 Vict. c. 42).

(*e*) As to the effect of the demise of the Crown generally, see p. 383, *post*.

(*f*) *Calvin's Case* (1608), 7 Co. Rep. 10 b, 11; 3 Co. Inst. 7; 4 Co. Inst. 156, 201, 352; 2 Steph. Com., 14th ed., 485; Bac. Abr. Prerog., A. See also p. 375, *post*. The acceptance of this doctrine appears to have been gradual, the importance of the ceremonies of the oath of recognition and coronation being originally far greater than it is now. As to the early doctrine of election, see note (*m*), p. 321, *ante*. Edward I. commenced to reign in 1272, though his coronation did not take place until 1274. Edward II. dated his reign from the day after his father's death. See Stubbs' Const. Hist., Vol. II., 103.

(*g*) Especially in view of the condition imposed by the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), with regard to the coronation oath. See p. 324, *ante*. According to Coke, the Crown descends to the rightful heir before coronation, for by the law of England there is no interregnum, and coronation is but an ornament or solemnity of honour; and so it was resolved by all the judges (*Calvin's Case*, *supra*). But coronation is a solemn recognition on the part of the nation that the legal authority is vested in the person of the King, and on the part of the King a solemn recognition of the fundamental rights of the people (see Bac. Abr. tit. Prerog., A, note (a)). Whether entitled by hereditary descent or not, the person crowned becomes the *de facto* King, and as such is entitled to allegiance and protected by the law of treason. See pp. 339, 345, *post*.

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Council, and the principal gentlemen of quality, with the Lord Mayor, aldermen, and citizens of London (*h*).

SECT. 6.—*Coronation.*

SUB-SECT. 1.—*The Ceremony.*

Court of Claims.

468. Prior to the actual ceremony of coronation, the rights of the various persons claiming to be entitled to perform ancient services thereat, or at the coronation banquet, are examined into and adjudicated upon by the Court of Claims (*i*).

Essential ceremonies.

469. The forms and ceremonies observed at the coronation have differed somewhat at the coronations of various Sovereigns (*k*), but the essential ceremonies (*l*) would appear to be:—

(1) (i.) (*m*) A presentation of the Sovereign to the people by the Primate accompanied by the Lord Chancellor, the Lord Great Chamberlain, and the Lord High Constable and Earl Marshal, with the Garter King-at-Arms, and a recognition of the Sovereign by the people (*n*);

(2) (iv.) The taking of the coronation oath in the form provided by statute (*o*);

(*h*) This is the established practice, for which there appears to be no direct legal authority other than usage. For the form of proclamation used on the accession of His Majesty King Edward VII., see the Supplement to the *London Gazette* Extraordinary, 22nd January, 1901.

(*i*) As to these services and the Court of Claims, see pp. 329 *et seq.*, *post*.

(*k*) For the form of ceremony used at the coronation of Queen Victoria, see Phillim. Eccl. Law, 2nd ed., 813. For the form and order of the ceremony used at the coronation of His present Majesty, which was based on the form observed at the coronation of William IV., the last occasion on which a queen consort was also crowned, but was somewhat abbreviated by leaving out the Litany (which was, however, previously celebrated), and the first oblation of the pall or altar cloth and wedge of gold, and curtailing the ceremony of homage, see Bodley's Coronation of Edward VII. A committee is usually appointed by the Sovereign for settling the details of the ceremony.

(*l*) The essential ceremonies are to be found in the Liber Regalis, which is in the custody of the Dean of Westminster. It gives the forms used as early as the coronation of Richard II., and probably, that of Edward II. See Wickham Legg, Eng. Coron. Rec., 81, where the contents of the Liber Regalis are given. The older writers state the ceremony simply as consisting of the oath of good government (which originally came first, it seems), the recognition, and coronation. See Taylor's Glory of Regality, 20, where he cites Doleman, Rights of the Kingdom, 23, on the authority of other old historians.

(*m*) The Roman numerals express the order in which the ceremonies actually occur.

(*n*) This ceremony represents the old elective principle. "*Non a regnando dicitur, sed a bene regnando et ad hoc electus est.*" See Taylor's Glory of Regality, pp. 15, 16, where he cites Bracton, lib. 3, c. 9, and Fleta as to the early doctrine of election. See also note (*m*), p. 321, *ante*.

(*o*) See p. 338, *post*. As to the modifications of the present form of oath, see note (*a*), p. 324, *post*. As to the provisions of the oath, see p. 338, *post*. The oath appears to have come first originally, because, presumably, the people would not have confirmed the election of the King had he not promised to govern according to law. See note (*n*), *supra*. The oath against transubstantiation may be taken at the coronation, but is usually taken at the meeting of Parliament. See p. 324, *ante*.

(3) (v.) An anointing by the Primate with the consecrated oil (*p*);

(4) (ix.) Coronation, and (xii.) enthronisation (*q*).

Other ceremonies observed at the coronation are:— Other ceremonies.

(5) (ii.) An oblation by the Sovereign of a pall or altar cloth of gold, and a wedge of gold (*r*);

(6) (iii.) The celebration of the Litany and the Communion, and the delivery of a sermon (*s*);

(7) (vi.) A presentation to the Sovereign of the spurs and sword, the girding on of the sword, and an oblation of the latter by the Sovereign (*t*);

(8) (vii.) An investiture with the armilla and imperial mantle, and presentation to the Sovereign of the orb with the cross (*a*);

(9) (viii.) An investiture with the ring and the two sceptres (*b*);

(*p*) The first English king to be anointed appears to have been Egbert, son of Ossa, King of Mercia (Selden, Tit. Hon., 1672 ed., p. 115). According to Thomas Becket, the oil was used in three places: "*in capite, etiam pectore, et brachiis, quod significat gloriam, et auctoritatem, et fortitudinem*" (*ibid.*, p. 109). The significance of the ceremony was pointed out by Robert Grosseteste, Bishop of Lincoln, to Henry III. (*ibid.*, 1614 ed., p. 135), and it is said by a modern writer that the regalia cannot be received without it. See Wickham Legg, Eng. Coron. Rec., Introduction, p. xxxiv. Queen Victoria was anointed on the head and hands only (*ibid.*, pp. xxxv., xxxvi.). His present Majesty was anointed in the form of the cross on the crown of the head, the breast, and the palms of both hands. See Bodley's Coronation of Edward VII., p. 440.

(*q*) After these ceremonies are performed the King is clothed with the full regal dignity. Enthronisation implies elevation, and the King is directed to be lifted up into the throne by the archbishops, bishops, and peers. See Bodley's Coronation of Edward VII., p. 445. So the early kings were raised on a stone, as at Kingston (King's Stone), where certain of the Saxon kings were crowned; and the Scone stone of Scotland is still used in the modern coronation throne. After the union with Scotland, 1706, the Scottish crown, sceptre and sword of State, were directed to be kept in Scotland as they were before the union, and so to remain in all time coming, notwithstanding the union (Union with Scotland Act, 1706, 6 Ann. c. 11 (5 & 6 Ann. c. 8, Ruff.) art. 24).

(*r*) This ceremony was omitted at the coronation of His present Majesty (see Bodley's Coronation of Edward VII., p. 433). The rite appears in the Liber Regalis (see Wickham Legg, Eng. Coron. Rec., p. 116). Though offered at the ceremony, the pall and the wedge of gold (weighing 1 lb.) do not, it seems, belong to the Church, but may be claimed by the Lord Chamberlain. The oblation originated in virtue of the commandment "Thou shalt not appear empty in the sight of the Lord thy God" (*ibid.*).

(*s*) The Litany and sermon were omitted at the coronation of His present Majesty (owing to His Majesty's delicate state of health), but the Litany was celebrated previously in St. Edward's Chapel at the consecration of the holy oil, before the arrival of the Sovereign. See Bodley's Coronation of Edward VII., p. 434.

(*t*) The sword signifies justice, protection to the defenceless, and punishment to the offenders. See *ibid.*, p. 441. After the sword has been girt about the Sovereign by the Lord Great Chamberlain it is offered by the former at the altar, but is redeemed by the first peer, who receives it from the Dean of Westminster at a fixed price. See *ibid.*, p. 442.

(*a*) The orb with the cross signifies that the whole world is subject to the empire of Christ. See *ibid.* 442. It appears in early representations sometimes as a sceptre, that is with a staff attached, and sometimes without. The sceptre and orb were first used together at the coronation of Charles II. (Wickham Legg, Eng. Coron. Rec., Introduction, pp. li., lii.).

(*b*) The ring is the ensign of kingly dignity, and an emblem of defence of the Christian faith. See Bodley's Coronation of Edward VII., p. 442. The ring is

SECT. 6. Coronation.

(10) (x.) A presentation to the Sovereign of the Bible (*c*);
(11) (xi.) The Benediction and *Te Deum*;
(12) (xiii.) Homage by the archbishops, bishops, and peers (*d*).

SUB-SECT. 2.—*Offices connected with the Coronation.*

Ancient services at coronation.

470. Various offices relating to services to be performed in connection with either the coronation procession, the service at Westminster Abbey, or at the coronation banquet in Westminster Hall (if such be held), are by custom or usage of a hereditary nature, and are descendible, either in gross, or as attendant upon or as an appanage of some particular office or title, or as an incident of the tenure of land by grand serjeanty (*e*). Though some of these ancient services may be dispensed with by the Sovereign, the persons from whom they are due are bound to perform them if called upon to do so (*f*).

Tenants by grand serjeanty.

471. Where the services are incidental to the ancient tenure of land known as *magnum servitium*, or tenure by grand serjeanty (*g*), which is subject to peculiar properties (*h*), they must be performed,

placed on the fourth finger of the right hand. After this ceremony the sceptre with the cross, symbolical of kingly power and justice, is placed in the King's right hand, and, after a glove has been presented by the lord of the manor of Worksop, the sceptre with the dove, signifying equity and mercy, is placed in his left hand. See Bodley's Coronation of Edward VII., p. 442. The sceptre with the dove appears upon the seal of Henry I., and its use probably became customary in the reign of Richard I. See Wickham Legg, Eng. Coron. Rec., Introduction, pp. lii., liii.

(*c*) The Bible is presented as the most valuable thing on earth, and signifies wisdom, royal law, and the lively oracles of God. See Bodley's Coronation of Edward VII., p. 443. The rite originated at the accession of William and Mary (Wickham Legg, Eng. Coron. Rec., Introduction, p. xvii.).

(*d*) The ceremony of homage was abbreviated at the coronation of His present Majesty, the Primate, the Prince of Wales, and the senior peer of each order doing homage on behalf of the other spiritual peers, the princes of the blood royal, and the peers of each order respectively. Homage is done by kneeling before the Sovereign and taking the oath (which is different in the case of spiritual and temporal peers), then rising and touching the King's crown, and kissing him upon the left cheek. See Bodley's Coronation of Edward VII., pp. 434, 446.

(*e*) The Coronation Proclamation, 26th June, 1901, classes all such offices as existing "by ancient customs and usages of the realm, as also in regard of divers tenures of lands, manors, and other hereditaments."

(*f*) See the Coronation Proclamation, 26th June, 1901, where the services usually performed in Westminster Hall or in the procession were dispensed with, saving the rights and privileges of persons claiming to perform them at any future coronation.

(*g*) "Tenure by grand serjeanty is where a man holds his lands of the King by such services as he ought to do in his own proper person, as to lead his army, carry his sword before him at his coronation, or to be his server at his coronation etc." (1 Co. Inst. 105 b). See title REAL PROPERTY AND CHATTELS REAL.

(*h*) Namely, (1) The land must be holden of the King only; (2) the service must be done when the tenant is able in proper person; (3) the service is certain and particular; (4) the relief due differs from knight's service (it is one year's value over and above all charges and reprises); (5) the service is to be done within the realm; (6) is subject neither to *aid pour faire fitz chivalier*, or *file marier*; (7) and pays no escuage (1 Co. Inst. 105 b). By the statute abolishing the feudal tenures (12 Car. 2, c. 24, s. 7) the honorary services of grand serjeanty are preserved, other than those of wardship, marriage and value of forfeiture of marriage, escuages, voyages royal, and other charges incident to

it is said, where the tenant is able, in proper person (*i*); and where the service (as in the case of coronation services) is to be done to the royal person of the King, a deputy cannot be appointed without the King's licence (*k*). It seems that a tenant by grand serjeanty held also by knight's service, and that therefore the services could not properly be performed by any person below the degree of knight (*l*); nor may the service be performed during minority, or by a woman (*m*), though in both these cases a proper deputy may be appointed by the King (*n*).

Committee of claims.

472. It is customary for the validity of claims relating to the honorary services to be determined before the coronation by the Court of Claims; and the hereditary office of Lord High Steward, before whom the Court of Claims was originally held, having become merged in the Crown (*o*), the claims and petitions of all persons relating to coronation services are now adjudicated upon by a royal commission appointed by proclamation under the Great Seal, termed the "Committee of Claims" (*p*). This proclamation designates the persons (or quorum of such persons) who are to form the committee to receive, hear, and determine the claims and petitions exhibited, signifies the royal pleasure as to what portions of the ceremonies are to be observed at the coronation and considered by the committee (*q*), and appoints a day for the meeting of the committee upon which all persons may attend for exhibiting their claims and petitions (*r*). No precedents being in

tenure by knight's service, and other than *aid pour faire fitz chivalier*, or *pour file marier*. See also title REAL PROPERTY AND CHATTELS REAL.

(*i*) 1 Co. Inst. 107 a, and see the last note.

(*k*) *Ibid.* But where the tenure is of the King by cornage (viz., by winding a horn to give notice of the enemy's approach, which is also grand serjeanty), or to serve the King in war, there a deputy may be appointed by the tenant (*ibid.*, 106 b, 107 a).

(*l*) 1 Co. Inst. 107 b; Taylor, Glory of Regality, p. 109.

(*m*) *Ibid.* It is noted by Taylor that certain of the duties of the Lord Great Chamberlain, as to carry the King his clothes on the morning of coronation, must, in the case of a Queen, of necessity be performed by a woman deputy (Glory of Regality, p. 111), and the same would be the case, *semble*, in respect of kindred services by grand serjeanty.

(*n*) 1 Co. Inst. 107 b.

(*o*) The high stewardship belonged originally, it is said, to the family of Grentemaisnel, in connection with the lordship of Hinckley, in the county of Leicester, and subsequently became connected with the earldom of Leicester by marriage, and descended to Simon de Montfort, on whose attainder it was granted by Henry III. to Edmund Crouchback, descending from him to John of Gaunt (whose presidency over the Court of Claims at the coronation of Richard II. appears to be the first recorded instance), and from the latter to Henry of Bolingbroke, afterwards Henry IV., in whom it became merged in the Crown (Taylor's Glory of Regality, p. 110; but see Wollaston, Coronation Claims, p. 9, as to the doubt with regard to the lordship of Hinckley).

(*p*) Down to the reign of Henry VII. high stewards appear to have been appointed at each coronation for holding the Court of Claims (see Wollaston, Coronation Claims, p. 12), and thenceforward commissioners in recent times without reference to the office of high steward. Wollaston (Coronation Claims, p. 12) cites Henry VIII.'s commission as omitting reference to the high steward; Taylor (Glory of Regality, p. 111, note 23) cites James II.'s commission as referring to the high steward.

(*q*) See note (*f*) on p. 328, *ante*.

(*r*) See the Coronation Proclamation, 26th June, 1901.

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existence with regard to the Court of Claims, the rules of procedure and evidence to be observed are such as may be formulated by the committee (*s*).

The judgments of the court are recorded by the Clerk of the Crown in Chancery (who, with the assistance of the Registrar of the Privy Council, is entitled to act as clerk of the court or of the committee), and are entered on the coronation roll (*t*).

SUB-SECT. 3.—*Services hereditary in gross.*

Hereditary offices.

473. The existing offices connected with the coronation which have been allowed by the Court of Claims as hereditary in gross, are those of Lord Great Chamberlain, and certain Scottish and Irish offices. Certain other hereditary offices are either doubtful or obsolete (*u*).

Great Lord Chamberlain.

474. The duties and perquisites of the office of Lord Great Chamberlain appear to be—to carry the King his shirt and clothes on the morning of the coronation and with the Lord Chamberlain (of the household (*x*)) to dress the King; to have forty yards of crimson velvet for a robe, also the King's bed and bedding and the furniture of his chamber where he lay the night before, with his wearing apparel and night-gown; also to serve the King with water before and after dinner, and to have the basins and towels and cup of assay (*y*). The office is at present vested in the representatives of co-heiresses, with the right to appoint a deputy, who must not be below the degree of a knight and must be approved by the King (*z*).

Scottish and Irish claims.

475. The following Scottish and Irish claims were allowed at the coronation of His present Majesty:—

(1) The claim of the hereditary Usher of the White Rod or principal Usher for Scotland to be present at the coronation, no duties, however, being assigned (*a*);

(*s*) At the first meeting of the Court of Claims in 1901 resolutions were adopted and issued in the form of a notice, and these, together with a memorandum as to documentary evidence, formed the rules of procedure and evidence observed (see Wollaston, Coronation Claims, pp. 26, 27, where the rules are set out).

(*t*) The claim of the Clerk of the Crown in Chancery to act in this capacity was allowed by the Court of Claims in 1901 (see p. 334, *post*).

(*u*) The office of Earl Marshal is now generally admitted to be hereditary in the family of the Duke of Norfolk, and is exercised by him (see Adye on Courts-martial, p. 8).

(*x*) See Vol. VII., Part. VI., Sect. 8.

(*y*) See Taylor, Glory of Regality, pp. 111, 112; Wollaston, Coronation Claims, pp. 125, 126. The robe, it is said, is all that is allowed, the other fees being compounded for (see Taylor, *supra*, p. 112). The claims to forty ells of crimson velvet and for a box in Westminster Abbey were disallowed by the Court of Claims in 1901, the first on the ground of insufficiency of evidence, the second as not being the proper subject of a claim as of right (see Wollaston, Coronation Claims, p. 132).

(*z*) Namely, the Earl of Ancaster, the Marquis of Cholmondeley, and the Earl Carrington, by a decision of the Committee for Privileges (see Wollaston, Coronation Claims, pp. 296, 301, 302).

(*a*) Allowed to the Walker trustees (incorporated under the Walker Trust Act, 1877 (40 & 41 Vict. c. viii.), the office having been conveyed by trust deed of

(2) The claim of the hereditary Standard Bearer of Scotland (*b*);
(3) The claim of the hereditary Lord High Constable of Scotland to attend, with the right to receive a silver baton tipped with gold at each end, and with the arms of the Sovereign at one end and his own at the other (*c*);
(4) The claim of the Lord High Steward of Ireland to carry a white staff if summoned to attend by the Sovereign (*d*).

Miscellaneous claims.

476. The following offices of a hereditary nature have been claimed, but were either not adjudicated upon, or referred to the committee for arranging the coronation ceremonies:—
(1) The right to carry the sceptre with the dove (*e*);
(2) The right to attend as hereditary Master Falconer (*f*);
(3) The right to attend as Armour Bearer and Squire of the Body of the King (*g*);
(4) The right to attend as Bow Bearer (*h*);
(5) The right to attend as hereditary Marshal of Ireland and Royal Standard Bearer (*i*);
(6) The office of hereditary Chief Butler of Ireland (*k*);
(7) The right to attend as hereditary Master of His Majesty's Household of Scotland, and to carry the rod or baton of office (*l*);
(8) The right to bear the staff of St. Edward (*m*);
(9) The office of Carver to His Majesty in Scotland (*n*);
(10) The right to carry the orb (*o*).

the foundress) to be present by deputy to be appointed by the King (Wollaston, Coronation Claims, pp. 60—70).

(*b*) Wollaston, Coronation Claims, pp. 70—100. Allowed by the Court of Claims in 1901 to Henry Scrymgeour-Wedderburn, but a contrary decision has been given by the Court of Session, declaring the right to be vested in the Earl of Lauderdale (*Lauderdale (Earl)* v. *Scrymgeour-Wedderburn* (1908), 45 Sc. L. R. 949).

(*c*) Allowed to the Earl of Errol (Wollaston, Coronation Claims, pp. 146—148).

(*d*) Allowed to the Earl of Shrewsbury. The office was conferred by letters patent of 15th September, 1871, and included the right to carry a white wand when attending State ceremonials (*ibid.*, pp. 160—163).

(*e*) Claimed by the Duke of Richmond in 1901, but not adjudicated upon (see Wollaston, Coronation Claims, p. 184). This, and other cases where no claim as of right was shown, were referred to the committee for arranging the coronation ceremonial, whose report was not made public (*ibid.*, p. 181, note 1).

(*f*) Claimed by the Duke of St. Albans in 1901, but not adjudicated upon (*ibid.*, p. 185).

(*g*) Claimed in 1901, but no order made (*ibid.*, pp. 169—174).

(*h*) Claimed in 1901, but no order made for want of evidence of right (*ibid.*, pp. 174, 175).

(*i*) Claimed variously in 1901, but no order made on the ground that the title to the barony of De Morley must first be determined by the Committee for Privileges (*ibid.*, pp. 176—180).

(*k*) Claimed by the Marquis of Ormonde in 1901, but excluded from the jurisdiction as relating to the banquet (*ibid.*, pp. 279—281, and see note (*f*) on p. 328, *ante*).

(*l*) Claimed by the Duke of Argyll in 1901, but not adjudicated upon (*ibid.*, p. 186). Another claim was also made to attend as one of the Masters of the Household (*ibid.*, p. 191).

(*m*) Claimed by the Duke of Roxburghe in 1901, but not adjudicated upon (*ibid.*, p. 187).

(*n*) Claimed in 1901, but not adjudicated upon (*ibid.*, pp. 190, 287).

(*o*) Claimed by the Duke of Somerset in 1901 as senior duke next to the

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Doubtful offices.

477. With regard to certain other offices of a hereditary nature which have been allowed at previous coronations (*p*), there appears to be some doubt. These are—

(1) The right to carry the great or gold spurs among the regalia in the procession to the Abbey (*q*);

(2) The right to carry the first sword of state, or *curtana*, and the right to carry the second and third swords (*r*).

(3) The office of Chief Butler, or *Pincerna*, has been claimed as hereditary, but whether this is so appears doubtful (*s*).

(4) The office of hereditary Carver appears to have been allowed to the Earl of Lincoln before that title merged in the Crown on the accession of Henry IV. (*t*).

(5) The office of hereditary Grand Almoner (*a*) is said to belong to the barony of Bedford, and was allowed to the Earl of Exeter at the coronation of James II. (*b*).

SUB-SECT. 4.—*Services connected with Offices.*

Services connected with offices.

478. The following services have been claimed, and allowed by the Court of Claims, as belonging to the holders of certain offices:—

(1) The claim of the Dean and Chapter of Westminster for the Dean to instruct the King in the rites and ceremonies used at the coronation, and to assist the Archbishop in performing divine service; also to keep the robes and ornaments of the coronation in the vestry of St. Peter's Church in Westminster; also to

Duke of Norfolk, and in virtue of the performance of the services by various predecessors, but not adjudicated upon (*ibid.*, p. 181).

(*p*) For a list of the various offices allowed since Richard II., see Wollaston, Coronation Claims, Appendix B.

(*q*) See Taylor, Glory of Regality, p. 138, where it is stated to descend to Lord Grey de Ruthyn by descent from the family of Hastings, Earls of Pembroke (*ibid.*, cited MS. Cott. Vesp., cxiv., p. 133; Harl., 592, p. 24; Collins, Baronies by Writ, pp. 242, 243). At the coronation in 1901 it was variously claimed by Lord Grey de Ruthyn, Lord Loudoun, and Lord Hastings, but the claim was held not to have been established in any case, sufficient evidence of the nature of the office not being adduced (Wollaston, Coronation Claims, p. 124).

(*r*) See Taylor, Glory of Regality, pp. 149—153, where it is suggested that the right was incident to the ownership of a county palatine. The first sword appears to have been carried by the Earl of Chester and Duke of Lancaster, the second sword by the Earls of Pembroke, whose claim was preserved by the families of Hastings and Grey de Ruthyn, but is now lost, it is said. The third sword is said to have been borne by the Earls of Warwick (*ibid.*, pp. 149, 150). At the coronation in 1901 the right as to the sword of state was claimed by the Earl of Huntingdon, and as to the second sword by Lord Hastings, but no order was made (see Wollaston, Coronation Claims, 124, 189).

(*s*) See p. 336, *post*.

(*t*) Taylor, Glory of Regality, p. 125. The office was claimed by the Earl of Denbigh in 1901, in virtue apparently of a summons to certain ancestors to attend in that capacity (see Wollaston, Coronation Claims, pp. 284, 286), but, being in connection with the banquet, was not adjudicated upon (see note (*f*), p. 328, *ante*).

(*a*) Taylor, Glory of Regality, p. 117, where the fees are said to be the silver dish with the linen napkin covering it and a tun of good wine, the former only being allowed (*ibid.*).

(*b*) *Ibid.*, p. 118, citing as to the title MS. Cott. Vesp., cxiv., p. 133; Lyson, Magna Britannia, i., p. 46. At the coronation in 1901 the office was claimed by the Marquis of Exeter, but the claim was not argued, and no order was made by the Court of Claims (Wollaston, Coronation Claims, pp. 223, 224).

certain fees in return for these services (*c*). This claim is now invariably allowed (*d*).

(2) The claim by custom of the Bishop of Durham and the Bishop of Bath and Wells to support the King in the procession, the first walking on his right hand, the latter on his left (*e*), and also at the solemnities (*f*). This claim is now invariably allowed (*g*).

(3) The claim of the barons of the Cinque Ports to carry over the King in his procession a canopy of cloth of gold or purple silk, with a gilt silver bell at each corner, supported by four staves or lances (*h*), four barons to every staff; also to carry a like canopy in the same manner over the Queen consort, and to take for their fee the canopies, bells, and staves, with the privilege of dining at a table on the King's right hand (*i*). This service is performed by thirty-two barons (or free men) of the Ports, habited alike in crimson satin (*k*).

(4) The claim of the Lord Mayor of the City of London by prescription to attend in person in the Abbey, and to walk in the procession from the entrance of the Abbey to the choir, or other part thereof where the coronation may be solemnised, bearing before the King the crystal sceptre or mace of the City (*l*); also in person to serve the King after dinner with wine in a gold cup, and to have the cup and its cover for his fee (*m*). The Lord Mayor and

(*c*) See Taylor, Glory of Regality, pp. 133, 134; Wollaston, Coronation Claims, pp. 155—159. The fees given by Taylor (on the authority of Sandford, p. 132, and Claims at the Coronations of Queen Anne and George II.) are robes for the Dean, his three chaplains, and sixteen (six only claimed in 1901) ministers of the church, the royal habits put off in the church, the several oblations, the furniture of the church, the staves and bells of the canopies held over the King and Queen in the church, the cloth upon which the King walks from the west door to the theatre or platform, an ounce of gold for the chantor, a hundred manchet loaves, and the third part of a tun of wine. For the fees claimed in 1901, see Wollaston, Coronation Claims, pp. 158, 159. The claim was allowed in 1901 subject to the King's pleasure, as to removal of the robes and ornaments and the allowance of the fees (Wollaston, Coronation Claims, p. 159).

(*d*) That is, since the reign of James I. (see Wollaston, Coronation Claims, Appendix B, *ante*).

(*e*) Taylor, Glory of Regality, p. 133.

(*f*) Wollaston, Coronation Claims, pp. 153, 154. In 1901 this claim was allowed except as to the procession, which was dispensed with (*ibid.*).

(*g*) That is, since the coronation of Charles II. (see Wollaston, Coronation Claims, Appendix B). According to Taylor, the custom, the origin of which is doubtful, existed *temp.* Richard I. (Glory of Regality, p. 133).

(*h*) Covered with silver, according to Taylor (Glory of Regality, p. 139).

(*i*) Taylor (Glory of Regality, pp. 139, 140) cites Great and Ancient Charter of the Cinque Ports etc. (12mo, 1682), p. 68; MS. Cott. Vesp., cxiv., p. 130; M. Paris *sub an.* 1236 (Hen. 3). In 1901 a claim to attend in person was added, the procession being dispensed with, but the Court of Claims adjudged only that if His Majesty desires a canopy, then the barons are entitled to bear it (Wollaston, Coronation Claims, pp. 39, 46).

(*k*) According to Taylor, the number of barons is—for Hastings, three; Dover, two; Hythe, two; Rye, two; Sandwich, three; Romney, two; Winchelsea, two; the same with either canopy (Glory of Regality, p. 139, note 89).

(*l*) This claim is not referred to by Taylor, but was claimed and allowed by the court in 1901, *semble* on the authority of Sandford (Coronation of James II., pp. 77, 81, 82, 87) (see Wollaston, Coronation Claims, pp. 53, 57, 60).

(*m*) Taylor, Glory of Regality, p. 141. Claimed in 1901, but excluded under the proclamation (Wollaston, Coronation Claims, pp. 52, 60).

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Commonalty of London also claim by prescription that the Lord Mayor and twelve citizens, to be chosen by them, should serve in the office of butler in aid of the Chief Butler of England; also to sit at a table next the cupboard on the left side of the hall (*n*).

(5) The claim of the Mayor, aldermen, and citizens of Oxford, under their charter, to serve in the office of butler, as assistants to the Chief Butler of England (*o*).

(6) The claim of Lyon King of Arms to attend in the procession and at the coronation on the right hand of Garter King of Arms (*p*).

(7) The claim of the three heralds and three pursuivants of Scotland to attend in the procession and at the coronation (*q*).

(8) The claim of Ulster King of Arms and Athlone Pursuivant of Arms to attend at the coronation (*r*).

(9) The claim of the Clerk of the Crown in Chancery, assisted by the Registrar of the Privy Council, to act as Clerk of the Court of Claims, and to be present at the coronation, and to draw up the coronation roll (*s*).

Claims not allowed etc.

479. Various claims connected with offices have also been made, but have not been allowed, or not adjudicated upon, or no order has been made thereon. These are—

(1) A claim by the Archbishop of York to have a place and part consistent with his rank in the Church, to act in place of the Archbishop of Canterbury if absent, and to crown the Queen consort (*t*).

(2) A claim by the Master of the Horse to be Sergeant of the Silver Scullery (*a*).

(3) A claim by the States of Jersey, through the Bailiff, to be

(*n*) Taylor (Glory of Regality, pp. 140, 141) cites M. Paris *sub. an.* 1236 (Hen. 3), and Claims Ric. 2. Claimed in 1901, but excluded under the proclamation (Wollaston, Coronation Claims, pp. 53, 59, 60).

(*o*) Taylor (Glory of Regality, p. 141) cites MS. Cott. Vesp., A, v., for an account of the services, and states the original charter to have been granted by Henry I., and confirmed by charter of Henry III. (citing Liber Niger, 1774, Vol. II., 820). The service appears to have been allowed from the coronation of Charles II. to that of William IV., but was excluded in 1838 and 1901, there being no banquet (Wollaston, Coronation Claims, Appendix B, and p. 278).

(*p*) Right to be present allowed in 1901, but no duties assigned by the court (Wollaston, Coronation Claims, pp. 46, 48).

(*q*) Right to be present allowed in 1901, but no duties assigned by the court (Wollaston, Coronation Claims, pp. 47, 48), the number of the heralds and pursuivants reduced from six in either case to three by the Lyon King of Arms Act, 1867, (30 Vict. c. 17) (*ibid.*).

(*r*) Judgment in 1901 as in last note (Wollaston, Coronation Claims, pp. 49—52).

(*s*) Claimed in 1901, together with a fee of five yards of scarlet for a gown or robe, and allowed by the Court of Claims, the fee to be referred to the pleasure of the Crown (Wollaston, Coronation Claims, pp. 164—165).

(*t*) Claimed in 1901, but not pressed as of right and not considered by the court, the Crown accepting the suggestion of the Archbishop of Canterbury that the Archbishop of York should crown the Queen (Wollaston, Coronation Claims, pp. 148, 151, note 1).

(*a*) This claim appears to have been made at various times from James II. onwards, but invariably to have been referred to the King (Wollaston, Coronation Claims, Appendix B).

represented at the coronation, and to present an address in the event of addresses being received (*b*).

(4) A claim by the sheriffs of the City of London to walk in the procession, with the precedence to which they are entitled (*c*).

(5) A claim by the Honourable Corps of Gentlemen-at-Arms to carry up the courses at the coronation banquet (*d*).

Also the following claims: By the Viscount of Jersey to have a place assigned to him (*e*); by the Mayors and Corporations of York, Camberwell, Hackney, Hampstead, and Weymouth, to be represented (*f*); by the High Bailiff of the City of Westminster, to attend (*g*); by the governing body of Westminster School for the King's scholars and town boys to be present in the Abbey and acclaim the King (*h*); by certain ladies, claiming the office of herbstrewer (*i*); by the Grey Coat Hospital Westminster, to be represented (*k*); by the British Medical Association to appear by deputation (*l*); by the Grand United Order of Oddfellows (*m*); by the owner of Corfe Castle, in the island of Purbeck, and Admiral of the Island of Purbeck, to attend (*n*); by the Honorary Surgeon Dentist to the King in Scotland, to be present; also claims by certain others (*p*).

SUB-SECT. 5.—*Services connected with the Tenure of Land.*

Claims by tenants in grand serjeanty.

480. The following services incidental to the tenure of lands by grand serjeanty (*q*), have been allowed by the Court of Claims:—

(1) The claim of the lord of the manor of Worksop in Nottinghamshire, to find a glove for the King's right hand at the

(*b*) Claimed in 1901, but not, it appears, as of right, and no order was made (see Wollaston, Coronation Claims, pp. 210, 211).

(*c*) Claimed in 1901, but no order made (see Wollaston, Coronation Claims, pp. 166—169).

(*d*) Claimed in 1901, but excluded under the terms of the proclamation (*ibid.*, p. 291).

(*e*) This claim was also made by virtue of the feudal tenure of Rosel Manor, but the service, as being out of the island, was not claimed as of right (see Wollaston, Coronation Claims, pp. 208—210).

(*f*) These claims were made in 1901, but not, it seems, as of right, and no order was made (see Wollaston, Coronation Claims, pp. 199—205).

(*g*) Claimed in 1901, on the ground that predecessors in office had similarly attended, but no order made (see Wollaston, Coronation Claims, p. 225).

(*h*) Claimed in 1901 by immemorial usage, but no order made (Wollaston, Coronation Claims, pp. 193—196).

(*i*) Claimed in 1901, but no order made (Wollaston, Coronation Claims, pp. 292, 293).

(*k*) Claimed in 1901, but no order made (*ibid.*, pp. 196—197).

(*l*) Claimed in 1901, but no order made (*ibid.*, p. 198).

(*m*) Claimed in 1901, but not, *semble*, as of right, and no order made (*ibid.*, p. 205).

(*n*) Claimed in 1901, but no order made (*ibid.*, p. 225).

(*o*) Claimed in 1901, but no order made (*ibid.*, p. 227).

(*p*) Viz., the rector of Hillsborough, county Down (*ibid.*, p. 207); the editor of the *Globe* newspaper (*ibid.*, p. 206); the Nawab of Karnal (*ibid.*, p. 214); the widow of the Sirdar Bhai Jasmir Singh (*ibid.*, p. 212); a former Queen's scholar of St. Peter's College, Westminster (*ibid.*, p. 226). These claims were not, it seems, made as of right, and no order was made by the Court of Claims.

(*q*) See p. 328, *ante*, as to this tenure.

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coronation (*r*), and to support his right arm while holding the royal sceptre (*s*).

(2) The claim of the lord of the manor of Scrivelsby in Lincolnshire (*t*), to perform the service of King's Champion, whose duties are to ride into the hall during the coronation banquet, mounted on one of the King's coursers, and clad in one of the King's best suits of armour. He is attended by the Lord High Constable (if that office is filled), and the Earl Marshal, and by a herald proclaims a challenge to any who shall deny that the King is lawful Sovereign. This being done, the King drinks to him from a gold cup (*a*).

(3) The claim to perform the service of Chief Butler at the coronation banquet, whose duties do not appear to be clearly defined (*b*). This office is said to have been conferred by William the Conqueror upon William de Albini, as incident to the tenure of the manor of Buckenham, with those of Kenninghall, Wymondham, and Snetsham in Norfolk (*c*), but whether it is appendant to a title or honour, an incident of tenure by grand serjeanty, or hereditary in gross, appears to be doubtful (*d*).

(4) The claim to perform the service of Chief Larderer, or Lardiner, who is intrusted with the care and management of the royal larder, and of all provisions contained in it, and is entitled to certain fees (*e*).

(*r*) See note (*b*), p. 327, *ante*.

(*s*) Taylor, Glory of Regality, pp. 138, 139, where the service is stated to have been attached originally to the manor of Farnham Royal in Buckinghamshire till that manor was exchanged with Henry VIII. for the manor of Worksop, which was granted upon the same tenure by letters patent, 26th November, 33 Hen. 8 (*ibid.*, note 88, citing Blount, p. 22). In 1901 it was variously claimed by the Duke of Newcastle and the Earl of Shrewsbury, and adjudged to the former without any fee (Wollaston, Coronation Claims, pp. 133, 146).

(*t*) Originally conferred by William I. upon Robert de Marmion with the castle of Tamworth. The service was claimed by the owner of the latter at the coronation of Richard II., but adjudged to Scrivelsby (Taylor, Glory of Regality, p. 137, cites MS. Cott. Vesp., cxiv., p. 133).

(*a*) Taylor, Glory of Regality, p. 135. The service was claimed by the owner of Scrivelsby in 1901, but excluded under the royal proclamation (Wollaston, Coronation Claims, p. 282). The fees are said to be the gold cup and cover, with the horse, saddle, suit of armour, and furniture (Taylor, Glory of Regality, p. 135).

(*b*) See Taylor, Glory of Regality, p. 119. The fees claimed are said to be, the best gold cup and cover, with all the vessels and wine remaining under the bar, and all the pots and cups, except those of gold or silver, which are in the wine cellar after dinner (*ibid.*, citing Sandford, Coronation of James II., p. 134).

(*c*) Taylor, Glory of Regality, p. 119, cites Camden's Britannia, Norfolk.

(*d*) The office has been variously claimed or exercised as an appanage of or attendant upon the title or honour of Arundel, as an incident of tenure of the manors of Buckenham and Kenninghall, or as hereditary in the family of William de Albini. At the coronation in 1901 it was claimed in all three capacities but excluded from the jurisdiction of the Court of Claims by the terms of the commission (see Wollaston, Coronation Claims, pp. 228—277). The various claims are discussed by Taylor (Glory of Regality, pp. 118—125), who inclines to the view that it was incident by grand serjeanty to the lordship of Buckenham, but owing to sub-division became allowed to the possessors of the larger portion of that lordship, viz., the manor of Kenninghall.

(*e*) Taylor, Glory of Regality, p. 128. The fees are said to be the remainder of the beef, mutton, venison, birds, lard, and other flesh, as also the fish, salt etc.,

(5) The claim of the owner of the manor of Liston in Essex to perform the service of Waferer, whose duties are to make wafers for the King and Queen and bring them up to their table in return for certain fees (*f*).

(6) The claim of the lord of the manor of Great Wymondley in Hertfordshire to serve the King with the first cup of which he drinks at dinner, and to retain the cup, which is of silver gilt, as his fee (*g*).

(7) The claim of the lord of the manor of Heydon in Essex to serve the King with a towel before the banquet, no fees, however, being allowed (*h*).

(8) The claim of the lord of the manor of Addington (or Bardolf's manor) in Surrey to the service of finding a man to make a mess of *grout* or *dillegrout* in the King's kitchen, and bring it to the King's table in person (*i*).

(9) The claim of the lord of the manor of Nether Bilsington to present the King with three maple cups on the coronation day (*k*).

remaining in the larder after the coronation feast (*ibid.*). The service has been variously claimed by and allowed to the owners of the manors of Scoulton or Sculton in Norfolk, Easton or Eston in Essex, Shipton Moyne in Gloucestershire, and Madington in Wiltshire (see Taylor, Glory of Regality, pp. 128—131; Wollaston, Coronation Claims, Appendix B). It is also said to be connected with the manor of Oweres in Dorset, Shipton, Madington and Oweres being held originally by the same lord (Taylor, Glory of Regality, p. 131, cites MS. Harl. 592, p. 24). The co-existence of several serjeanties in the various manors was, it seems, admitted by the judgment of the Court of Claims at the coronation of James II. and Anne (Taylor, Glory of Regality, p. 130, where, however, separate services, as that of caterer, are suggested). The service was claimed in 1901 by the owner of Shipton Moyne, but excluded under the royal proclamation (Wollaston, Coronation Claims, p. 288).

(*f*) Taylor, Glory of Regality, p. 146. The fees are said to be all the instruments of silver and other metal used in making the wafers, with the linen and proportions of the ingredients used, and liveries for himself and two men (*ibid.*, p. 146, where the ingredients are given). The office has been consistently allowed since Henry II. or John (Taylor, Glory of Regality, p. 147), and was claimed in 1901, but excluded under the proclamation (Wollaston, Coronation Claims, p. 283).

(*g*) Taylor, Glory of Regality, p. 126. The original grant is said to have been by William I. to one Fitzeck (*ibid.*, p. 126). The service was consistently allowed up to the reign of George IV., and was claimed in 1901 by the owner of Great Wymondley, but excluded by the proclamation (Wollaston, Coronation Claims, Appendix B, and p. 289).

(*h*) Taylor, Glory of Regality, p. 145. The service seems to be subsidiary to that of the Lord Great Chamberlain, who claims to serve the water, and to receive the basins and towels for fee (*ibid.*, cites Claims, Edw. 6, MS. Cott. Vesp. a. v.). The office was consistently allowed to the owner of Heydon down to the reign of George IV., but has not since been claimed (Wollaston, Coronation Claims, Appendix B).

(*i*) Taylor, Glory of Regality, pp. 147—149, where the nature of the dish is given. The claim was consistently allowed to the owner of the manor down to the reign of George IV. In 1807 the manor was sold to the See of Canterbury (Taylor, Glory of Regality, p. 149; Wollaston, Coronation Claims, Appendix B).

(*k*) Taylor, Glory of Regality, p. 144. The claim was consistently allowed from Charles II. to the reign of George IV., since when it has not been claimed (see Wollaston, Coronation Claims, Appendix B; Taylor, Glory of Regality, p. 144). The origin of the service appears to be connected with that of Chief

SECT. 6. Coronation.

(10) The claim of the lord of the Isle of Man to bring two falcons to the King on the coronation day (*l*).

Extinct services.

481. The services of the Dapifer or Server (*m*), the Grand Panneter or Panterer (*n*), and Napier or Naperer (*o*), appear to have become extinct, whilst the office of Chamberlain to the Queen, though claimed at various times, does not appear to have been allowed, at any rate since the reign of Richard II. (*p*).

Part III.—Relations between the Crown and Subject.

SECT. 1.—*The Crown's Duty towards the Subject.*

The coronation oath.

482. The essential duties of the Crown towards the subject (*q*) are now to be found expressed in the terms of the oaths which every Sovereign is required to take before or at his coronation. The duties imposed by the coronation oath (*r*) are:—

(1) To govern the people of the United Kingdom of Great Britain and Ireland, and the dominions thereto belonging, according to the statutes in Parliament agreed on and the laws and customs of the same (*s*);

Butler, the manor being held originally by William de Albini, Earl of Arundel (Taylor, Glory of Regality, p. 144).

(*l*) The sovereignty of the island was granted by Henry IV. to the Earl of Northumberland by this service, which was reserved when the sovereignty was resumed by the Crown (see the Isle of Man Purchase Act, 1765 (5 Geo. 3, c. 26), and title DEPENDENCIES AND COLONIES). The service has been consistently allowed when claimed (see Wollaston, Coronation Claims, Appendix B).

(*m*) The officer who brings up and arranges the dishes. It is said to have been attached to the Barony of Fitzwalter, and the claim to have been revived *temp.* Charles II., but since become extinct (Taylor, Glory of Regality, pp. 124, 125).

(*n*) The duties were to carry the salt and carving knives from the pantry to the table. The service was attached to the manor of Kibworth Beauchamp in Leicestershire, but extinguished by reversion of the manor to the Crown. The claim was revived *temp.* George II., but disallowed (Taylor, Glory of Regality, pp. 127, 128).

(*o*) The person having charge of the table linen, said to have been attached to the manor of Ashill or Ashley in Norfolk and extinguished by forfeiture, and subsequent change of tenure to knight-service, *temp.* Philip and Mary (Taylor, Glory of Regality, p. 132).

(*p*) See Wollaston, Coronation Claims, Appendix B.

(*q*) The Crown's duty towards the subject rested originally upon a semi-feudal bond, whereby the King, as liege lord, was bound to maintain and defend his people in return for service and obedience. See *Calvin's Case* (1608), 7 Co. Rep. 1 a, at p. 5 a.

(*r*) The coronation oath must be taken at the coronation under the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 2. For the statutory form of the oath, see stat. 1 Will. & Mar. c. 6; sess. 1, c. 6, Ruff. As to the alteration in the oath as at present administered, see note (*a*), p. 325, *ante*.

(*s*) By s. 4 of the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), it is declared

SECT. 1. The Crown's Duty towards the Subject.

(2) To cause law and justice in mercy to be executed in all judgments, to the utmost of the Sovereign's power;

(3) To maintain the laws of God, the true profession of the Gospel, and the Protestant reformed religion established by law;

(4) To maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England;

(5) To preserve unto the bishops and clergy of England, and to the Church therein committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them (*t*).

The Sovereign is also bound by oath to preserve the Presbyterian Church in Scotland (*u*).

SECT. 2.—*The Subject's Duty towards the Crown.*

SUB-SECT. 1.—*Allegiance*

(1.) *Nature of Allegiance.*

Allegiance.

483. As, in feudal phraseology, the King was styled "liege lord," so his subjects were termed "liege subjects," and are bound as such to serve and obey him (*a*). Hence the duty of the subject towards the Sovereign is known legally as allegiance.

Allegiance is by statute due to the King for the time being, whether he be the rightful heir to the Crown or not, and his subjects are bound to serve him in war against every rebellion, power, and might reared against him, and are protected in so doing from attainder of high treason and from all forfeitures and penalties (*b*). The duty of allegiance is applicable to the Sovereign as well in his natural as in his regal or political capacity (*c*).

that "whereas the laws of England are the birthright of the people thereof, and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same, . . . the same are ratified and confirmed accordingly." As to the observance of conventional law, see p. 382, *post*. The duty of the Crown to exercise the prerogative conformably to law is treated of fully hereafter. See p. 371, *post*.

(*t*) Stat. 1 Will. & Mar. c. 6, sess. 1, c. 6, Ruff.

(*u*) Union with Scotland Act, 1706 (6 Ann. c. 11, 5 & 6 Ann. c. 8, Ruff.), art. 25, s. 8. This oath is taken previously to the coronation. See note (*d*), p. 325, *ante*. As to the declaration against transubstantiation, see p. 324, *ante*.

(*a*) *Calvin's Case* (1608), 7 Co. Rep. 1, 5 a.

(*b*) Stat. 11 Hen. 7, c. 1. It is said by Lord Hale that if the right heir once had possession, and then a usurper got possession, but the right heir still continued his claim, and ultimately regained possession, a compassing of his death during the interval is treason; but *semble* owing to the provisions of the Treason Act, 1495 (11 Hen. 7, c. 1). This would not be so if the compassing were directed by the *de facto* King (1 Hale, P. C. 104). As to treason to the *de facto* King, see p. 346, *post*.

(*c*) For withholding their allegiance to the King in his natural capacity, and treating him with asperity and harshness, the Despencers were banished in the reign of Edward II. See *Despencers' Case* (1320), 1 State Tr. 23; *Calvin's Case, supra;* 1 Bl. Com., 14th ed., 370; *Axtell's Case* (1660), 5 State Tr. 1146, 1175.

SECT. 2. The Subject's Duty towards the Crown.

Allegiance has been distinguished as of three kinds, according to the persons from whom it is due, namely, natural, local, and acquired (*d*).

(2.) *Natural Allegiance and Natural-born British Subjects.*

Natural allegiance.

484. Natural allegiance is due from all natural-born British subjects (*e*), and all persons born within the British dominions are natural-born British subjects (*f*), including the children of alien parents, provided the latter are at amity, and owe obedience to the King (*g*). But a child born of an alien enemy within the kingdom is not a British subject (*h*); and where a child born of an alien at amity within the kingdom becomes a foreign subject by virtue of the law of the country where his parents resided, he may, when of age, if he still remains such foreign subject, make a declaration of alienage (*i*).

Children born outside the British dominions are by statute British subjects, provided their father was at the time of their birth himself a British subject (*k*), as also are grandchildren on the father's side (*l*). This status, however, having been conferred upon children and grandchildren by substantive enactment, is not transmissible to their posterity, either at common law or otherwise (*m*).

An alien woman marrying a natural-born or naturalised British subject acquires herself the status of a natural-born British subject (*n*).

(*d*) *Calvin's Case* (1608), 7 Co. Rep. 1, 5 b; Co. Litt. 129 a.

(*e*) *Ibid;* and see title ALIENS, Vol. I., at p. 303.

(*f*) *Calvin's Case* (1608), 7 Co. Rep. 1, 5 b, 18 a; and see the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 4.

(*g*) *Calvin's Case* (1608), 7 Co. Rep. 1, 6 a, 18 a. As to declaration of alienage by such persons, see title ALIENS, Vol. I., at p. 317.

(*h*) *Calvin's Case* (1608), 7 Co. Rep. 1, 18 a, b.

(*i*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 4; and see title ALIENS, Vol. I., at p. 317.

(*k*) Foreign Protestants Naturalization Act, 1708 (7 Ann. c. 5), as explained by the British Nationality Act, 1730 (4 Geo. 2, c. 21), s. 1.

(*l*) British Nationality Act, 1773 (13 Geo. 3, c. 21), s. 1. As to the exception in cases where the father is attainted of treason, or liable to the penalties of high treason or felony, or is in the actual service of any foreign prince or State at enmity with the Crown of England, see British Nationality Acts, 1731 and 1773 (4 Geo. 2, c. 21, s. 2; 13 Geo. 3, c. 21, s. 2). As to whether acts of the father can derogate from the rights of the children under the Acts apart from these exceptions, see *Wall's (Count de) Case* (1834), 3 Knapp, 13, P. C.; *Drummond's Case* (1834), 2 Knapp, 295, P. C.; *Jephson* v. *Riera* (1835), 3 Knapp, 130, P. C.; *Fitch* v. *Weber* (1847), 6 Hare, 51; and see title ALIENS, Vol. I., p. 301. As to the children of parents who become aliens under the Naturalization Act, 1870 (33 & 34 Vict. c. 14), see s. 10 (3) of that Act. As to the children of parents readmitted to British nationality under the Act, see s. 10 (4); see also title ALIENS, Vol. I., p. 301.

(*m*) *De Geer* v. *Stone* (1882), 22 Ch. D. 243, *per* KAY, J., at p. 252.

(*n*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 10 (1); *R.* v. *Manning* (1849), 1 Den. 467. As to the status of aliens naturalised under the Naturalization Act, 1870 (33 & 34 Vict. c. 14), see title ALIENS, Vol. I., p. 301. As to the effect of cession of British territory on the inhabitants, see *Jephson* v. *Riera*, *supra*. As to persons born in the United States since the treaty of independence, see *Doe* d. *Thomas* v. *Acklam* (1824), 4 Dow. & Ry. (K. B.) 394; *Doe* d. *Auchmuty* v. *Mulcaster* (1826), 5 B. & C. 771; *Barrow* v. *Wadkin* (1857), 24 Beav. 327. As to persons born in Hanover before the accession of Queen Victoria and not naturalised, see *Re Stepney Election Petition, Isaacson* v. *Durrant*

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Under the maxim *Nemo potest exuere patriam*, natural allegiance is due wherever the subject resides; and a natural-born British subject cannot, apart from statute, divest himself of his British nationality so as to free himself from the duty of allegiance (*o*). But a British subject becoming naturalised in a foreign country ceases, in general, to be a British subject (*p*); and any person born out of the British dominions whose father is a British subject may, if of full age, divest himself of his British nationality by making a declaration of alienage (*q*). From such persons, therefore, allegiance would no longer be due.

Loss of nationality.

A British subject cannot, however, avail himself of the provisions of the Naturalization Act, 1870, and by becoming a naturalised subject of an enemy's country divest himself of his duty of allegiance in time of war (*r*), nor can he by so doing commit acts of treason with impunity (*s*); and the very fact of naturalisation in an enemy's country with a view to escaping liability for treasonable acts may, it seems, constitute an act of treason (*t*).

Subjects of protected states.

Subjects of states under British protection are not British subjects (*a*), but they are entitled to diplomatic protection when in foreign countries; and in foreign countries to which British jurisdiction has been extended they are, for purposes of jurisdiction, in the same position, in general, as British subjects (*b*).

(3.) *Local Allegiance.*

Local allegiance.

485. Local allegiance is due from all aliens resident within the realm, and, so long as they or their families remain within the King's protection, they are punishable as traitors for acts of treason, whether their country is at amity with this country or not (*c*).

(1886), 17 Q. B. D. 54. As to the status of persons born in Scotland after the accession of James I., see *Calvin's Case* (1608), 7 Co. Rep. 1.

(*o*) 1 Bl. Com., 1st ed., 369, 370, note 1; and see *R.* v. *Lynch*, [1903] 1 K. B. 444.

(*p*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 6. As to the power of making a declaration retaining British nationality in certain cases, see *ibid.*, and title ALIENS, Vol. I., p. 301.

(*q*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 4; and see title ALIENS, Vol. I., at p. 317. As to the effect of a certificate of readmission to British nationality under the Act, see *ibid.*, s. 8.

(*r*) *R.* v. *Lynch*, [1903] 1 K. B. 444, *per* Lord ALVERSTONE, C.J., at p. 458: "Further I am clearly of opinion that s. 6 [of the Naturalization Act, 1870] does not empower a British subject to become naturalised in an enemy's country during time of war. . . . Whatever a declaration of war may or may not do, it at any rate prevents British subjects from making arrangements with the King's enemies when such arrangements would constitute crimes against the law of the country to which they owe allegiance."

(*s*) *R.* v. *Lynch*, *supra*.

(*t*) *Ibid.*, *per* WILLS, J., at p. 459: "Naturalisation under the circumstances was itself an act of treason."

(*a*) See p. 448, *post*, and title DEPENDENCIES AND COLONIES.

(*b*) See Hall's Foreign Jurisdiction, p. 128.

(*c*) *R.* v. *De la Motte* (1781), 21 State Tr. 688; *Calvin's Case* (1608), 7 Co. Rep. 1, 6 a; 3 Co. Inst. 4; 1 Bl. Com., 14th ed., 370, note 2. The duty of allegiance ceases only when the alien withdraws himself, and his family and effects, and he remains liable for acts or purposes of hostility, even in the case of aiding his own countrymen. This rule was laid down by all the judges in 1707. See 1 East, P. C. 52, 53; Bl. Com., *supra*. *Semble*, an alien is liable for

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But allegiance is not due from an alien enemy coming to invade the realm (*d*).

(4.) *Acquired Allegiance.*

Acquired allegiance.

486. Acquired allegiance is due from aliens becoming naturalised under the provisions of the Naturalization Act, 1870 (*e*), or being made denizens. Aliens may become denizens either by Act of Parliament, by letters patent, or by conquest (*f*). The status of a denizen is usually conferred by the Crown by letters patent when it is desired to confer upon an alien without delay (*g*), or the expense of obtaining an Act of Parliament, some of the privileges of a British subject, and may be either absolute, limited, or conditional (*h*). If born out of the United Kingdom, a denizen, unless born of English parents, may not be a Privy Councillor or a member of either House of Parliament, or enjoy any office or place of trust, civil or military (*i*). The grant of letters of denization by the Crown is not affected by the Naturalization Act, 1870 (*k*).

Denizens.

(5.) *The Oath of Allegiance.*

Who must take.

487. Persons entering on certain offices (*l*) are required by law to take the oath of allegiance, or an affirmation or declaration in lieu of the oath, in the manner provided by statute (*m*), and aliens becoming naturalised are also required to take the oath (*n*).

The taking of the statutory oath does not add to the natural duty of a British subject, who is in all cases bound as though he had taken the oath (*o*). Refusal to take the oath in certain cases, however,

treason, even if himself abroad, if his family remain here (*R.* v. *De la Motte*, *supra*).

(*d*) *Calvin's Case* (1608), 7 Co. Rep. 1 a, 6 b, 3 Co. Inst. 4.

(*e*) 33 & 34 Vict. c. 14, s. 9. As to the conditions to be fulfilled and the status of naturalised aliens, see title ALIENS, Vol. I., p. 301.

(*f*) See *Calvin's Case* (1608), 7 Co. Rep. 1, 6 a; see title ALIENS, Vol. I., at p. 312.

(*g*) Five years' residence being required as a condition precedent to naturalisation under the Naturalization Act, 1870 (33 & 34 Vict. c. 14). See title ALIENS, Vol. I., p. 301.

(*h*) *Calvin's Case* (1608), 7 Co. Rep. 1, 6 a.

(*i*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3, virtually amended (*semble*) as to the right to take grants of lands, tenements, or hereditaments from the Crown by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2. See as to the latter provision, title ALIENS, Vol. I., p. 301.

(*k*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 13.

(*l*) The only persons required to take the oath are those mentioned in the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 5, 6, Schedule, the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), and the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), ss. 4, 5 (Promissory Oaths Act, 1868, (31 & 32 Vict. c. 72), s. 9); but this provision is not to affect the oaths required to be taken by certain persons (*ibid.*, s. 14), as to whom see Vol. VII., Part VI., sect. 1, and to the above must be added persons desirous of being naturalised (Naturalization Act, 1870 (33 & 34 Vict. c. 14), ss. 7, 9). The oath, as provided by s. 9 of the latter Act, is the same in form as that provided by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72).

(*m*) As to the making of an affirmation or declaration in lieu of an oath, see the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 11—13, and p. 343, *post*.

(*n*) See note (*l*), *supra*, and title ALIENS, Vol. I., p. 301.

(*o*) 2 Co. Inst. 121; 1 Bl. Com., 14th ed., p. 369; *Marryatt* v. *Wilson* (1799), 1 Bos. & P. 430, Ex. Ch.

entails disqualification from holding office, or vacation of the office if the person has already entered thereon (*p*), whilst in the case of clerical orders and preferments the taking of the oath is a condition precedent to ordination, or to institution or collation, or to the granting of a licence in the case of benefices (*q*). As regards peers and members of Parliament, sitting in either House or voting in the House of Commons without having first taken and subscribed the oath entails a fine in certain cases (*r*).

Affirmation in lieu of oath.

In all cases and for all purposes where the oath of allegiance is required to be taken, a solemn affirmation may be made in lieu of taking the oath by any person stating as the ground of his objection to taking the oath either that he has no religious belief or that the taking of an oath is contrary to his religious belief. The affirmation is of the same force and effect as the taking of the oath itself (*s*). But where an oath of allegiance has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking the oath no religious belief does not affect the validity of the oath (*t*).

SUB-SECT. 2.—*The Census.*

Census of persons resident in Great Britain and Ireland.

488. The nationality of all persons resident in Great Britain and Ireland at certain fixed dates, or who were travelling, or on shipboard, or, for any other reason, not abiding in the houses of which accounts of the inmates at the fixed time and date were taken, may be ascertained from the census returns made decennially under statutory authority (*a*). The last census for Great Britain was taken

(*p*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 7. As to the officers required to take the oath under that Act, see Vol. VII., Part VI., sect. 1.

(*q*) Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), ss. 4, 5; and see title ECCLESIASTICAL LAW.

(*r*) Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 5; and see *A.-G.* v. *Bradlaugh* (1885), 14 Q. B. D. 667, C. A., and title PARLIAMENT.

(*s*) Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1. This provision is general, and relates to all oaths. See also Vol. VII., Part VI., sect. 1.

(*t*) Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 3. This provision applies generally to all oaths. In *A.-G.* v. *Bradlaugh* (1885), 14 Q. B. D. 667, C. A., it was held that a person who had no belief in a Supreme Being had no legal ability solemnly to make and subscribe the oath of allegiance in manner required by the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 3, as amended by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), and was therefore incapable of lawfully sitting and voting in Parliament (*ibid.*, *per* LINDLEY, L.J., at p. 716). Since the passing of the Oaths Act, 1888 (51 & 52 Vict. c. 46), this decision is no longer applicable.

(*a*) The most recent census was taken, as to Great Britain, under the Census (Great Britain) Act, 1900 (63 Vict. c. 4), and as to Ireland, under the Census (Ireland) Act, 1900 (63 Vict. c. 6). The first census was taken in 1801 as to Great Britain. The census has been taken in Great Britain and Ireland every ten years from 1811 onwards. The returns are to be found amongst the Parliamentary Papers (see King's Index to the Parliamentary Papers, 1801—1900). In 1871 and 1881 the census contained particulars as to certain colonies. The preliminary report in the census of 1901 shows—(1) as to Great Britain, the tables of population and houses in England and Wales, and in the islands in the British seas, at midnight on the 31st March, 1901—see Parliamentary Paper, 1901, Cd. 616, xc., 1; (2) as to Ireland—see Parliamentary Paper, 1901, Cd. 613, xc., 179; (3) as to Scotland, tables of population, families, houses, and number of rooms with windows in Scotland and its islands, on the 31st March, 1900—see Parliamentary Paper, 1901, Cd. 644, xc., 203.

SECT. 2. The Subject's Duty towards the Crown.

on Monday, the 1st April, 1901, by enumerators (*b*) appointed by virtue of the Act, under the superintendence of the Local Government Board, and according to the provisions and directions of the Act. The forms and instructions used were prepared and issued by the Registrar-General, with the approval of the Local Government Board, and the expenses incurred, with the approval of the Treasury, for the purposes of the census were paid out of moneys provided by Parliament (*c*).

Irish census.

489. In Ireland the census was taken on the days following the same date by officers and men of the Dublin Police Force and Royal Irish Constabulary, with such other persons as the Lord Lieutenant directed or appointed, subject, in general, to similar provisions as to the particulars as in Great Britain (*d*).

Particulars furnished by occupiers.

490. The schedules prepared by or under the direction of the Local Government Board, and filled up by or on behalf of the several occupiers (*e*) of the dwelling-houses designated by the Act, contained the following particulars:—

(1) The name, sex, age, profession or occupation, condition as to marriage, relation to head of family, birthplace, and, where the person was born abroad, nationality, of every living person who abode (*f*) in Great Britain on the night of Sunday, the 31st March, 1901; and

(2) Whether any person who so abode was blind, or deaf and dumb, or imbecile, or lunatic; and

(3) Where the occupier was in occupation of less than five rooms, the number of rooms occupied by him; and

(4) As to Wales or the county of Monmouth, whether any person who so abode (being of three years of age or upwards) spoke English only, or Welsh only, or both English and Welsh (*g*).

(*b*) Census (Great Britain) Act, 1900 (63 Vict. c. 4), s. 2 (1).

(*c*) *Ibid.*, s. 2 (2), (3). In Scotland the Secretary and Registrar-General for Scotland were substituted for the Local Government Board and Registrar-General respectively, and certain other corresponding terms are also substituted (*ibid.*, s. 12 (1)).

(*d*) 63 Vict. c. 6, s. 2 (1).

(*e*) The returns were made by the occupiers (as defined by the Act) on schedules left by the enumerators at the dwelling-houses (namely, buildings and tenements used in whole or in part for human habitation) in the course of the week ending on the Saturday next before the census day, namely, Sunday, the 31st March. The schedules were directed to be collected on the following Monday (Census (Great Britain) Act, 1900 (63 Vict. c. 4), s. 4 (2), (3), (4)). Special provision was made by the Act for prisons, workhouses, hospitals, lunatic asylums, and all public or charitable institutions determined upon by the Registrar-General, as to which the enumeration of the inmates was directed to be made by the governor, master, or chief resident officer under instructions sent by the authority of the Local Government Board (*ibid.*, s. 6).

(*f*) Persons travelling or at work on the night of the census day, and who returned to a house on the morning of the following day, were directed to be treated as abiding in that house on the night of the census day (*ibid.*, s. 4 (5)).

(*g*) *Ibid.*, s. 4 (1). The schedules under the Act were also to include particulars showing whether any person who abode in any house in Scotland on the night of the census day (being three years old and upwards) spoke English or Gaelic only or both (*ibid.*, s. 12 (3)).

Particulars by enumerators.

491. The enumerators were also required to furnish particulars as to whether or not houses were occupied or inhabited (and with respect to each dwelling-house the number of rooms, including a kitchen, if any, having a window not being a window with a borrowed light), and as to the counties, boroughs, parishes, and other areas for electoral or administrative purposes, together with the ecclesiastical parishes or districts in which the houses were situate (*h*).

Persons travelling on shipboard or not abiding in houses on the census night.

Subject to the approval of the Local Government Board, particulars were also directed to be obtained as to persons who during the night of the census day were travelling or on shipboard, or for any other reason were not abiding on that night in any house of which account was to be taken (*i*).

Form of return.

492. The actual return consisted (1) of a preliminary abstract prepared by the Registrar-General, with the approval of the Local Government Board, and directed to be printed and laid before Parliament within five months next after the census day, or within fourteen days of the then next ensuing session if Parliament was not then sitting; and (2) of a detailed abstract (prepared as above) directed to be printed and laid before both Houses at as early a date as might be found practicable (*k*).

Power to supply further information to local authorities.

493. The Registrar-General may, if he thinks fit, at the request and cost of the council of any county, borough, or urban district, cause abstracts to be prepared containing statistical information with respect to the county, borough, or district, which can be derived from the census returns but is not supplied by the census report, and which in his opinion the council may reasonably require (*l*).

Penalties for defaults, false declarations etc.

494. A fine of £5, on summary conviction, was imposed by the Act on officers making default in their duties, or false declarations, and on occupiers with regard to offences connected with the returns to be made by them (*m*). It was also provided that any person employed in taking the census who communicated any information acquired in the course of his employment, without lawful authority, should be guilty of a breach of official trust within the meaning of the Official Secrets Act, 1889, which was to apply accordingly (*a*).

SUB-SECT. 3.—*Treason and Treasonable Offences.*

(1) *In General.*

Liability for treason.

495. All persons from whom allegiance is due are liable for acts of treason (*b*), but aliens are not liable, in general, unless

(*h*) Census (Great Britain) Act, 1900 (63 Vict. c. 4), ss. 5 (2), 12 (4).
(*i*) *Ibid.*, s. 7. See as to persons travelling or at work on the night in question, note (*f*) on p. 344, *ante*. These returns were to be included in the abstracts.
(*k*) *Ibid.*, s. 8.
(*l*) *Ibid.*, s. 9.
(*m*) *Ibid.*, s. 11.
(*a*) *Ibid.* See as to official secrets, Vol. VII., Part VI., sect. 1.
(*b*) As to the persons from whom allegiance is due, see pp. 339—342, *ante*.

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naturalised (*c*), or unless they owe local allegiance to the Sovereign (*d*). In opposition to the general rule in criminal cases, acts of treason committed outside British territory are punishable as soon as the traitor comes within the jurisdiction (*e*). And the provision as to the time within which proceedings may be taken for treason, other than a design or attempt to assassinate the King, committed in England, Wales, and Berwick-on-Tweed, namely, three years next after the commission of the offence, does not apply to treason committed out of the realm (*f*). Such acts of treason are therefore, it seems, punishable at any time.

Extent of protection.

496. The King or Queen regnant for the time being, whether the rightful Sovereign or not, is within the provisions of the Acts relating to treason and protected thereby (*g*). But the rightful Sovereign out of possession is not, it is said, within the provisions of the Acts (*h*). Neither is a consort (*i*), and, if it be deemed necessary, the latter must be protected by a special Act (*k*).

Extradition.

497. Treason is not one of the crimes with regard to which the Crown is empowered to make extradition treaties with foreign countries (*l*).

(2) *Treason.*

Compassing death etc. of Sovereign.

498. It is treason (*m*) for any person or persons whatsoever within the realm or without (*n*) to compass, imagine, invent, devise, or intend death (*o*) or destruction, or any bodily harm tending to

(*c*) As to alien women marrying British subjects, see p. 340, *ante;* as to naturalisation and as to when aliens become British subjects generally, see title ALIENS, Vol. I., p. 301.

(*d*) As to local allegiance, see p. 341, *ante.*

(*e*) See *R.* v. *Lynch*, [1903] 1 K. B. 444. This is one of the exceptions to the general rule by which "all crime is local." See *Macleod* v. *A.-G. for New South Wales*, [1891] A. C. 455, at p. 458: "The jurisdiction over the crime belongs to the country where the crime is committed, and, except over its own subjects, the Crown and the Imperial Legislature have no power whatever."

(*f*) Treason Act, 1695 (7 & 8 Will 3, c. 3), ss. 5, 6. See p. 353, *post.*

(*g*) 3 Co. Inst. 7; Bac. Abr. Prerog. A. These references refer to the Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2), but the same principle would, it is apprehended, apply to the later Acts. Acts of treason committed against Henry VI. while in possession of the crown were, therefore, punished after the accession of Edward IV., although the House of Lancaster were declared usurpers (4 Bl. Com., 14th ed., 77).

(*h*) 1 East, P. C. 54; and see note (*r*) on p. 363, *post.*

(*i*) 3 Co. Inst. 7, and see note (*f*), *supra.* As to the protection of the person of the Queen Consort, see p. 366, *post.*

(*k*) See p. 367, *post.*

(*l*) See the Extradition Acts, 1870 to 1906, and title EXTRADITION. In the case of killing the Sovereign, the criminal would, *semble*, be extraditable as a murderer, unless the killing could be regarded as a political offence.

(*m*) Treason was formerly divided into high treason and petty treason. As to the latter, see p. 350, *post.* Petty treason having been assimilated to murder by 9 Geo. 4, c. 31, s. 2, the necessity for the distinction no longer exists, and the offences constituting high treason are termed treason simply.

(*n*) See *supra.*

(*o*) As to acts which have been held to constitute a constructive compassing or imagining of the King's death, see p. 347, *post.*

Constructive treason.

death or destruction, maiming or wounding (*p*), imprisonment or restraint of the person of the Sovereign, to express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, and such compassings etc. or intentions, or any of them (*q*). Certain overt acts of conspiracy and rebellion have been construed as evidence of an intention to compass the King's death, or as an imagination thereof (*r*). Thus, it has been held that in every rebellion the law intends as a consequent the compassing the death and deprivation of the King (*s*). So, also, a conspiracy to depose the Sovereign (*a*), or a conspiracy to levy war against him (*b*), if manifested by overt acts, has been held to constitute treason; and the fact of becoming naturalised in an enemy's country after hostilities have commenced, or war has broken out, or, it seems,

(*p*) Where a prisoner was indicted for discharging at the Queen a pistol loaded with powder and a certain bullet, it was held that the jury must be satisfied that the pistol was actually loaded, and that it contained more than the powder and wadding. See *R.* v. *Oxford* (1840), 9 C. & P. 525). As to discharging firearms etc. with intent to alarm the Sovereign, see p. 358, *post*.

(*q*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2), as extended by the Treason Act, 1795 (36 Geo. 3, c. 7), s. 1. The latter Act extends to Ireland (Treason Act, 1848 (11 & 12 Vict. c. 12), s. 2), and was made perpetual by the Treason Act, 1817 (57 Geo. 3, c. 6), s. 1. S. 1 of the Treason Act, 1795 (39 Geo. 3, c. 7), was partially repealed by the Treason Act, 1848 (11 & 12 Vict. c. 12), s. 1. This latter section was repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), s. 1, but not so as to affect the repeal effected by it. As to the procedure where the overt act alleged in the indictment is an attempt to injure in any manner the person of the Sovereign, see the Treason Act, 1842 (5 & 6 Vict. c. 51), s. 1, and p. 352, *post*.

(*r*) The doctrines relating to constructive treason were enunciated in relation to the provision in the Treason Act, 1351 (25 Edw. 3, stat. 5. c. 2), as to "compassing or imagining the King's death." They would, it seems, apply *à fortiori* to the definition of treason as extended by the Treason Act, 1795 (36 Geo. 3, c. 7), s. 1, partially repealed by the Treason Act, 1848 (11 & 12 Vict. c. 12), s. 1.

(*s*) *Case of the Earls of Essex and Southampton* (1600), 1 State Tr. 1333, 1335. This opinion was expressed to the House of Lords by the two Chief Justices and the Lord Chief Baron of the Exchequer. They also expressed an opinion to the effect that the maintenance of armed men by a subject in order to force the King to govern otherwise than according to his own judgment was manifest rebellion (*ibid.*). See also 3 Co. Inst. 14; 1 Hale, P. C. 110, 151.

(*a*) *Horne Tooke's Case* (1794), 25 State Tr. 1, *per* EYRE, C.J., at p. 725: "All the writers state the law to be . . . that as to the case of a conspiracy to depose the King, that is a decisive overt act of compassing the death of the King." See also *Hardy's Case* (1794), 24 State Tr. 199, 1379, 1380. The facts were similar in both cases, being charged as overt acts manifesting a conspiracy to depose the King and put him to death, the formation of a convention to subvert the government and depose the King, together with the provision of arms for the defence of the convention. The jury acquitted in both cases, but the law is to be found in the summing up of the judges. See also p. 351, *post*.

(*b*) *Case of Sir Richard Grahme, Lord Preston, and Others* (1691), 12 State Tr. 646, 653. In this case the act of hiring and entering a boat on the Thames in order to convey papers and documents to the King of France, to assist him in invading the realm, was held to be treason. See also *Gregg's Case* (1708), 14 State Tr. 1371, where letters to the French minister relating to an expedition against Louis XIV. were intercepted; *Hensey's Case* (1758), 19 State Tr. 1341, *per* Lord MANSFIELD, C.J., 1344: "An overt act of the intention of levying war, or of bringing war upon the kingdom, is settled to be an overt act of compassing the King's death." Such cases of conspiracy to levy war may also be treated as adhering to the King's enemies (*ibid.*). And see p. 349, *post*.

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naturalisation in a foreign country even before hostilities with a view to committing treasonable acts, may constitute treason (*c*); but most of the offences which have thus been constructively held to constitute treason may now be dealt with under the statutory provisions relating to treason felony (*d*), though in a proper case an indictment may still be brought as for the offence of treason proper (*e*). But no person tried for felony may afterwards be tried for treason upon the same facts (*f*).

Riots.

499. To levy war against the King in his realm is treason (*g*), and this provision has been held to extend to cases of riot for various purposes (*h*). Thus, a riot for the purpose of pulling down brothels or breaking open prisons has been held to be treason (*i*). And where riots took place in support of a prisoner undergoing trial, and Dissenting meeting-houses were pulled down, and other acts of violence committed, it was held to be treason (*k*). So also a riot in order to attain an object of a general or public nature, such as the repeal of a law, through intimidation and violence, has been held to be treason (*l*). And many more instances are to be found (*m*). But in such cases, in order to constitute treason, there

(*c*) *R.* v. *Lynch*, [1903] 1 K. B. 444, 459; and see p. 341, *ante*. Naturalisation under such circumstances does not protect a person from the consequences of treason (*ibid.*). There are numerous other instances of constructive treason, but this branch of the law of treason has lost much of its former importance owing to the statutory extension of the definition of treason by the Treason Act, 1795 (36 Geo. 3, c. 7), since the cases were decided (see note (*q*) on p. 347, *ante*), as well as to the statutory provisions by which such offences may now in many cases be treated as treason felony. See p. 354, *post*.

(*d*) See p. 354, *post*.

(*e*) It is expressly provided by the Treason Act, 1848 (11 & 12 Vict. c. 12), s. 6, that nothing contained in that Act is to lessen the force of, or in any way affect, anything enacted by the Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2).

(*f*) Treason Act, 1848 (11 & 12 Vict. c. 12), s. 7.

(*g*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2).

(*h*) The principles underlying the decisions in these cases are ill defined, and the law of treason as enunciated thereunder has, according to Sir James Stephen, being unduly stretched. See Steph. Hist. Crim. Law, ed. 1883, Vol. II., p. 271. See also Luder's Law Tracts, "Constructive Treason." The principle that riot may constitute treason was established by *Dammaree's Case* (1710), 15 State Tr. 521, but the same reasoning is found in 3 Co. Inst. 9, 10, where cases of Elizabeth's reign are cited.

(*i*) *Messenger's Case* (1668), 6 State Tr. 879, 901, 908.

(*k*) *Dammaree's Case* (1710), 15 State Tr. 521. See also *Willis' Case* (1710), 15 State Tr. 613; *Purchase's Case* (1710), 15 State Tr. 651.

(*l*) *Gordon's* (*Lord George*) *Case* (1781), 21 State Tr. 485, *per* Lord MANSFIELD, C.J., at pp. 644, 645: "I tell you the joint opinion of us all is that if this multitude assembled with intent, by acts of force and violence, to compel the Legislature to change a law, it is high treason. . . . Whoever incites, advises, . . . or is in any way encouraging to such a multitude assembled with such intent, though he does not personally appear among them, yet he is equally a principal."

(*m*) See *Gordon's* (*Lord George*) *Case*, *supra*, *per* Lord MANSFIELD, C.J., at p. 644: "Insurrections by force and violence to raise the price of wages, to open all prisons, to destroy meeting-houses, nay to destroy all brothels, to resist the execution of militia laws, to throw down all inclosures, to alter the established law, or change religion, or to redress grievances real or pretended, have all been held levying war." But see note (*h*), *supra*, as to the law of treason having been unduly stretched.

must be an insurrection accompanied by force, and for an object of a public or general nature (*n*). Acts of piracy may also, it seems, be charged as treason if there is an intention to take the King's ships as well as those of the subject (*o*).

Aiding King's enemies.

500. It is treason to be adherent to the King's enemies in the realm, giving to them aid and comfort in the realm or elsewhere (*p*). This provision has been held to extend to letters of advice and correspondence and intelligence to the enemy to enable them to annoy us or to defend themselves, written in order to be delivered (*q*); and the case is the same though such correspondence is intercepted, and never in fact reaches the enemy (*r*).

The apprehension of having property wasted or destroyed affords no legal excuse for joining or continuing with enemies or rebels (*s*). But it is otherwise, it appears, where a person joins enemies or rebels through compulsion or intimidation, and in fear of death, and provided he remains with them only whilst the force or fear continues (*t*). The orders of a superior officer afford no excuse for consorting with rebels or performing treasonable acts (*a*).

Protection of queen consort, heir apparent etc.

501. It is treason for any person to compass or imagine the death of the King's wife (*b*) during the life of the King, but not when she becomes queen dowager (*c*), nor, it seems, if she be divorced (*d*), or of his eldest son and heir (*e*), or, it is said, of the heir apparent, whether he be the first-born son of the Sovereign or not, but not if he be a collateral (*f*), or to violate the King's

(*n*) 3 Co. Inst. 9, 10; *R.* v. *Frost* (1839), 9 C. & P. 129. A person leading an armed body of demonstrators to procure the liberation of political prisoners or a mitigation of their punishment, and not intending to take the town or attack the military, was held not guilty of treason, though such an offence is an aggravated misdemeanour (*ibid.*).

(*o*) *R.* v. *Evans* (1782), 1 East, P. C. 80; 2 East, P. C. 798. Most of the cases in the text above may now be treated under the Acts relating to treason felony (p. 354, *post*), or under the Riot and other Acts. See title CRIMINAL LAW AND PROCEDURE. The decisions have therefore lost some of their former importance. See also note (*c*), p. 348, *ante*.

(*p*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2). See also *R.* v. *Lynch*, [1903] 1 K. B. 444, and pp. 341, 347, *ante*.

(*q*) *Hensey's Case* (1758), 19 State Tr. 1341, *per* Lord MANSFIELD, C.J., at col. 1344; *Gregg's Case* (1708), 14 State Tr. 1371, 1376; *Maclane's Case* (1797), 26 State Tr. 721, 796, 797.

(*r*) *Gregg's Case, supra; Maclane's Case, supra.* Such cases may also be charged, it appears, as compassing or imagining the death of the King (see p. 347, *ante*) by conspiring to levy war.

(*s*) *R.* v. *MacGrowther* (1746), 18 State Tr. 391, 393; 1 East, P. C. 71.

(*t*) *R.* v. *MacGrowther, supra, per* LEE, C.J., at p. 394: "The only excuse . . . is force upon the person and the present fear of death. . . . The force and fear must continue all the time he remains . . ., agreeably to the rule in *Oldcastle's Case* (1419), 1 Hale, P. C. 50."

(*a*) 1 East, P. C. 71; *Axtell's Case* (1660), 5 State Tr. 1146, 1175.

(*b*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2).

(*c*) 3 Co. Inst. 8.

(*d*) See, as to the wife of the heir apparent, 1 East, P. C. 64, 65. The case of the King's wife would, it is apprehended, be the same.

(*e*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2).

(*f*) 3 Co. Inst. 8, 9. But see 1 East, P. C. 64, where some doubt is expressed as to grandsons.

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wife (*g*) during his lifetime (*h*), but not, *semble*, if she be divorced (*i*), or the King's eldest daughter being unmarried (*k*), or the wife of the King's eldest son and heir (*l*) during coverture (*m*).

Protection of the succession.

502. It is treason to endeavour to deprive or hinder any person who shall be next in succession to the Crown for the time being, according to the limitations in the Acts relating thereto (*n*), from succeeding after the demise of the Sovereign to the Imperial Crown of the realm and the dominions and territories thereunto belonging, according to the limitations in the said Acts, and to attempt the same maliciously, advisedly, and directly by an overt act or deed (*o*). In such a case the abettors, procurers, and comforters, knowing the said offence to be done, are equally liable with the offender himself (*p*).

Maintaining adverse claims.

503. It is treason maliciously, advisedly, and directly by writing or printing to maintain and affirm that any other person or persons has of have any right or title to the Crown otherwise than according to the Acts relating thereto (*q*), or that the kings and queens of the realm are not able, with and by the authority of Parliament, to make laws and statutes of sufficient force and validity to limit and bind the Crown and the descent, limitations, inheritance, and government thereof (*r*).

Petty treason.

504. Certain other offences made treason by statute (*s*) may now, it seems, be treated as murder simply (*t*). The offences which

(*g*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2). As to the liability of the Queen Consort for treason, if she consents in such a case, see p. 366, *post*. Violation in the statute means carnal knowledge with or without consent. See 1 East, P. C. 65.

(*h*) 3 Co. Inst. 8.

(*i*) See note (*d*) on p. 350, *ante*.

(*k*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2).

(*l*) *Ibid.* This provision would, it seems, apply to the wife of the heir apparent, but not if he be a collateral. See 3 Co. Inst. 8, 9.

(*m*) 1 East, P. C. 65. It is otherwise, it appears, if she be divorced (*ibid.*).

(*n*) The Acts mentioned are the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), and the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2); but the latter only now applies. See pp. 321, 322, *ante*, as to the present title.

(*o*) Treason Act, 1702 (1 Ann., stat. 2, c. 21 (c. 17, Ruff.)), s. 6.

(*p*) *Ibid.*

(*q*) The Acts set out in the statute are the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2); the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2); and the Union with Scotland Act, 1706 (6 Ann. c. 11; 5 & 6 Ann. c. 8, Ruff.).

(*r*) Succession to the Crown Act, 1707 (6 Ann. c. 41 (c. 7, Ruff.)), s. 1. These statutes, on which this paragraph is based, are stated by some writers to be obsolete or of no effect. It is difficult to see how this can be, since they provide the principal constitutional safeguard for the preservation of the present line of succession.

(*s*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2). These offences are to kill the King's chancellor, treasurer, or justices, being in their places doing their offices. The provisions of the Act relating to counterfeiting the King's coinage and the great and petty seals were repealed by the Coinage Offences Act, 1832 (2 & 3 Will. 4, c. 34), s. 1, and the Forgeries Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 66), s. 31.

(*t*) Under the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100). The Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2), also provides that, in case

before the year 1828 would have amounted to petty treason (*a*) are now to be deemed to be murder only, and no greater offence, and principals and accessories are to be dealt with in all respects as in cases of murder (*b*).

Overt acts.

505. In order to constitute the offence of treason, the compassing and imagining must be evidenced by an overt act or overt acts (*c*), and such acts as conspiring, combining, confederating, or agreeing for any of the purposes mentioned above (*d*), or meeting or assembling together and consulting and agreeing (*e*), or advising, persuading, or commanding any person with a view to any of the above purposes (*f*), or assenting to any overtures therefor (*g*), may properly be charged as overt acts, and generally any such acts as sufficiently indicate an intention to commit any particular species of treason, and conducing to its execution, may properly be alleged as acts of high treason, even though the whole plan should prove abortive (*h*).

any supposed treason not specified therein should come before the justices, they shall before going to judgment cause it to be showed to the King and Parliament, to know whether it shall be adjudged treason or felony. As to this clause see Stephen, Hist. Crim. Law, II., pp. 252, 253. As to murder, generally, see title CRIMINAL LAW AND PROCEDURE.

(*a*) The offences constituting petty treason were:—(1) for a wife to kill her husband; (2) for a servant to kill his master or mistress; (3) for a person secular or religious to kill the prelate to whom he owed faith and allegiance (Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2); and see 1 East, P. C. 336—338).

(*b*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 8.

(*c*) The Treason Act, 1795 (36 Geo. 3, c. 7), s. 1, provides, as to the offences therein mentioned, for expressing, uttering etc., by publishing any printing or writing, or by any overt act or deed (see p. 347, *ante*); but the same principles apply, it is apprehended, to all classes of treason; and in cases falling within the Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2), it is provided by that Act that persons should "thereof be probably" (another rendering appears to be "provably": see the Statutes Revised, Vol. I., p. 110, note 2; *Vaughan's Case* (1696), 2 Salk. 634) "attainted by open deed by the people of their condition." See also *Despard's Case* (1803), 28 State Tr. 345, 349.

(*d*) *Mulcahy* v. *R.* (1867), I. R. 1 C. L. 12, 35, 36; (1868) L. R. 3 H. L. 306. This case was decided under the Treason Felony Act, 1848 (11 & 12 Vict. c. 12), but the principles there laid down apply also in cases of treason. For cases of treason proper, see *Parkyn's (Sir William) Case* (1696), 13 State Tr. 63; *Rookwood's Case* (1696), 13 State Tr. 139; *Vaughan's Case* (1696), 2 Salk. 634; *Layer's Case* (1722), 16 State Tr. 94; *Downie's Case* (1794), 24 State Tr. 1; *Hardy's Case* (1794), 24 State Tr. 199; *Watts' Case* (1794), 23 State Tr. 1167, 1186, 1187; *Howley's Case* (1803), 28 State Tr. 1183; *MacIntosh's Case* (1803), 28 State Tr. 1215; *O'Connell* v. *R.* (1844), 11 Cl. & Fin. 155, 233, H. L.; *R.* v. *Lynch*, [1903] 1 K. B. 444.

(*e*) *Tonge's Case* (1662), 6 State Tr. 226; *Vane's (Sir Henry) Case* (1662), 6 State Tr. 119; *Despard's Case*, *supra*, *per* Lord ELLENBOROUGH, C.J., at 349.

(*f*) *O'Connell* v. *R.* (1844), 11 Cl. & Fin. 155, H. L.

(*g*) Assent to overtures is a plain overt act equally as advice, persuasion, or command, to incite, encourage, or procure others to make an attempt upon his person (1 East, P. C. 59; and see *Mulcahy* v. *R.* (1867), I. R. 1 C. L. 12, *per* WHITESIDE, C.J., at p. 35; *Despard's Case*, *supra*. Mere presence at a treasonable meeting, coupled with previous knowledge of the design and subsequent concealment, is evidence of assent to be left to the jury (1 East, P. C. 59).

(*h*) *Despard's Case*, *supra*, *per* Lord ELLENBOROUGH C.J., at 349, 350.

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Procedure.

506. Where the overt act alleged in cases of treason for compassing any bodily harm tending to the death etc. of the Sovereign is an attempt to injure in any manner the person of the Sovereign, the indictment, trial, arraignment, and other proceedings are to take place according to the same course and order as in murder, and in such cases the provisions of the Acts (*i*) relating to trial in cases of treason and misprision of treason are not to apply (*j*). Judgment and execution, however, are to be the same as in treason, and this provision is not to affect the punishment for treason or misprision of treason (*k*). In cases of treason peers and peeresses are entitled to trial by their peers (*l*).

Two witnesses necessary.

No person may be indicted, tried, or attainted (*m*) of high treason or misprision of treason except upon the oath of two lawful witnesses, either both of them to the same overt act, or one of them to one and the other to another overt act of the same treason, unless the accused willingly and without violence in open court confesses the same, or stands mute, or refuses to plead (*n*), or unless (in cases of high treason) he peremptorily challenges more than thirty-five jurymen (*o*).

No accessories in treason.

507. In treason there are no accessories either before or after the fact, all such persons being principals (*p*), since the bare intent to commit treason is, in general, actual treason (*q*). But this principle does not apply to misprision of treason, or to any of the treasonable offences not amounting to treason proper (except treason felony) (*r*) which do not amount to the legal notion of compassing the death of the King, Queen, or heir apparent (*s*).

Punishment.

508. The punishment for a person convicted of treason is hanging (*a*). But the Sovereign may by warrant under the sign

(*i*) The Acts referred to are the Treason Act, 1695 (7 & 8 Will. 3, c. 3), the Treason Act, 1708 (7 Ann. c. 21), and the Juries Act, 1825 (6 Geo. 4, c. 50).

(*j*) Treason Act, 1842 (5 & 6 Vict. c. 51), s. 1.

(*k*) Treason Act, 1842 (5 & 6 Vict. c. 51), ss. 1, 3.

(*l*) Stat. 35 Hen. 8, c. 2, s. 2; Treason Act, 1695 (7 & 8 Will. 3, c. 3), s. 11. A majority vote is sufficient to acquit or condemn, and upon any trial for treason or misprision all peers having a right to sit and vote are to be summoned twenty days before the trial (*ibid.*, s. 10). As to trial by the peers generally, see titles COURTS; CRIMINAL LAW AND PROCEDURE; PARLIAMENT. These provisions do not extend to any impeachment or other proceeding in Parliament (*ibid.*, s. 11).

(*m*) See title CRIMINAL LAW AND PROCEDURE.

(*n*) In such cases the court may now direct a plea of not guilty to be entered. See the Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28), s. 2, and title CRIMINAL LAW AND PROCEDURE.

(*o*) Treason Act, 1695 (7 & 8 Will. 3, c. 3), s. 2. As to challenges to the jury in cases of treason, see title CRIMINAL LAW AND PROCEDURE.

(*p*) 3 Co. Inst. 138; 1 Hale, P. C. 613; 4 Bl. Com., 14th ed., 35; *Thistlewood's Case* (1820), 33 State Tr. 681, 690.

(*q*) See pp. 346, 349, *ante*.

(*r*) See p. 354, *post*.

(*s*) 4 Bl. Com., 14th ed., 36. *Quære* whether this would apply to cases of treason felony. See pp. 354, 355, *post*. As to accessories generally, see title CRIMINAL LAW AND PROCEDURE.

(*a*) Treason Act, 1814 (54 Geo. 3, c. 146), s. 1, as to men; Treason Act, 1790 (30 Geo. 3, c. 48), s. 1, as to women; both partially repealed, with regard to

manual, countersigned by a principal Secretary of State, direct that, in place of hanging, the head of the convicted person shall be severed from his body whilst alive, and may also direct and order how the head and body are to be disposed of (*b*). The property of a person outlawed for not appearing to meet a charge of treason is subject to forfeiture (*c*). A person may also be convicted of treason (or indeed of any other offence) by bill of attainder (*d*), which is now, however, practically obsolete.

Time limit.

509. In cases of treason or misprision of treason committed within England, Wales, and the town of Berwick-upon-Tweed, no person may be tried or prosecuted unless the indictment be found by a grand jury within three years next after the offence was committed (*e*). This provision does not extend to treason committed out of the realm (*f*), in Scotland (*g*) or Ireland, or which may therefore, it seems, be tried at any distance of time.

(3) *Misprision of Treason.*

Definition.

510. Misprision of treason is the concealment or keeping secret of any high treason (*h*) by a person who is not a party or consenter to it (*i*). In order to constitute misprision of treason there must, it

drawing on a hurdle to the gallows, quartering etc., by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 31.

(*b*) Treason Act, 1814 (54 Geo. 3, c. 146), s. 2. In such a case it is lawful for the sheriff or other person to whom the warrant or order is directed, or whom it shall concern, to carry the same into execution accordingly (*ibid.*).

(*c*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 1. As to outlawry, see title CRIMINAL LAW AND PROCEDURE. The forfeiture to the Crown is superior to the lord's right of escheat *propter delictum tenentis*, and includes lands, goods, and chattels. See title REAL PROPERTY AND CHATTELS REAL. By the Treason Act, 1695 (7 & 8 Will. 3, c. 3), s. 3, any person indicted for treason or misprision of treason may be outlawed and thereby attainted upon conviction for the offence of treason or misprision of treason. In case of high treason, where by law after such outlawry the party outlawed may come in to be tried, he is to have the benefit of the Act upon such trial.

(*d*) As to bills of attainder, see title PARLIAMENT. Such a bill might provide for the forfeiture of the convicted person's property or any other penalty, since Parliament can make any law.

(*e*) Treason Act, 1695 (7 & 8 Will. 3, c. 3), s. 5. The provisions of the statute 33 Hen. 8, c. 12, as to the trial of treason, misprision, manslaughter, and offences involving bloodshed, committed within the royal palaces, before the Steward of the Household, are still unrepealed.

(*f*) See p. 346, *ante*. Treason committed out of the realm is to be tried in such shire or county before such persons as are appointed by commission under the Great Seal. Outlawry in such cases is to be of the same effect as against persons resident in the realm (stat. 5 & 6 Edw. 6, c. 11, s. 4; see also stat. 35 Hen. 8, c. 2, s. 1).

(*g*) Treason committed by natives of Scotland on the high sea, or in any place out of Great Britain, is to be tried before such commissioners of oyer and terminer, and in such shire, stewartry, or county of Great Britain as shall be assigned by the King's commission, as if committed in such shire, stewartry, or county (Treason Act, 1708 (7 Ann. c. 21), s. 7). No person accused of any capital offence or other crime in Scotland is to be subject or liable to any torture (*ibid.*, s. 5).

(*h*) Stat. 1 & 2 Phil. & Mar. c. 10, s. 8.

(*i*) 1 East, P. C. 139.

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is said, be a knowledge of the traitor as well as of the treasonable design or offence (*k*). Therefore, if a person has knowledge of an intending rising or rebellion, but not of the persons taking part, and conceals his knowledge, it is not misprision of treason (*l*). But it is otherwise if a person having explicit knowledge of the parties discloses only the fact that treason is intended (*m*). The disclosure of the treason ought to be made in convenient time, either to the King or Privy Council, or to some magistrate or person in authority, and it is doubtful whether any other disclosure would be sufficient to relieve a person from the guilt of misprision (*n*). Concealment may in some cases amount to evidence of assent (*o*), or possibly of conspiracy (*p*), and in such a case the person concealing the treason would be liable as a principal (*q*).

Treason includes misprision of treason, and therefore a person suspected of the former may be indicted for the misprision only (*r*).

Punishment.

511. Conviction of misprision of treason, for which the oath of two witnesses is necessary (*s*), entails imprisonment for life (*a*); and, where sentence of outlawry is passed (*b*), forfeiture to the Crown of the profits of land during life, and absolute forfeiture of goods (*c*). Peers indicted for misprision of treason are entitled to trial by their peers (*d*).

(4) *Treason Felony.*

Treason felony.

512. It is felony for any person whatsoever, within the United Kingdom or without, to compass, imagine, invent, devise, or intend to deprive or depose the Sovereign from the style, honour, or royal name, of the Imperial Crown of the United Kingdom, or of any other of His Majesty's dominions and countries (*e*).

In order to constitute an offence such compassings must be expressed, uttered, or declared by publishing any printing or writing, or by any overt act or deed (*f*). A conspiracy for the separation of Ireland from the Crown of England, and to set up a

(*k*) 1 East, P. C. 139; 1 Hale, P. C. 372.
(*l*) 1 East, P. C. 139, 140.
(*m*) *Ibid.*
(*n*) *Ibid.* 139.
(*o*) *Ibid.* A person present at a consultation where treason is hatched, and concealing it, is guilty of treason (*Thistlewood's Case* (1820), 33 State Tr. 681, *per* ABBOTT, C.J., at p. 690).
(*p*) See *R.* v. *Meaney* (1867), I. R. 1 C. L. 500.
(*q*) *Ibid.*, *per* WHITESIDE, C.J., at pp. 553, 554; 1 East, P. C. 139.
(*r*) 1 East, P. C. 140.
(*s*) Treason Act, 1695 (7 & 8 Will. 3, c. 3), s. 2.
(*a*) Stat. 1 & 2 Phil. & Mar. c. 10, s. 8; 1 Hale, P. C. 374, 375; 1 East, P. C. 140.
(*b*) See Treason Act, 1695 (7 Will. 3, c. 3), s. 3. As to outlawry in criminal cases generally, see title CRIMINAL LAW AND PROCEDURE.
(*c*) Stat. 1 & 2 Phil. & Mar. c. 10, s. 8; 1 Hale, P. C. 374, 375; 1 East, P. C. 140.
(*d*) Treason Act, 1555 (1 & 2 Phil. & Mar. c. 10), s. 8; and see note (*l*), p. 352, *ante*. For the procedure and rules of evidence in cases of treason and misprision of treason, see title CRIMINAL LAW AND PROCEDURE.
(*e*) Treason Felony Act, 1848 (11 & 12 Vict. c. 12), s. 3.
(*f*) *Ibid.*

separate republic by acts of force, such as the destruction of public and other buildings by nitro-glycerine and other explosives, as evidenced by overt acts of manufacturing nitro-glycerine in large quantities, has been held sufficient to constitute this offence (*g*); and a conspiracy to levy war for a public purpose, such as the separation of Ireland, is sufficient to support an indictment for compassing to depose the Sovereign (*h*).

Supplying arms.

So also the storing and sending of arms to be used in aid of a treasonable confederacy, having for its object the overthrow of the Government in any part of the Sovereign's dominions, has been held sufficient to constitute this offence (*i*). In such a case the person who supplies the arms with knowledge of a traitorous object, though himself not caring about it, but for the sake of gain, is guilty of the offence (*k*). Moreover, the mere fact of being in possession of explosives, under such circumstances as to lead to the inference that they can only be intended for the destruction of property in order to overturn the Government by violent means, is a sufficient overt act to support an indictment for compassing to depose (*l*).

Levying war.

513. It is felony for any person whatsoever, within the United Kingdom or without, to compass, imagine, invent, devise, or intend (*m*) to levy war against the Sovereign within any part of the United Kingdom in order by force or constraint to compel him to change his measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe, both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other of the Sovereign's dominions or countries under the obeisance of the Sovereign (*n*). The compassing etc. must be expressed by overt act as in the case of compassing to depose (*o*).

When such acts of force have been contemplated or committed, it will be sufficient to show an intention for some public purpose,

(*g*) *R.* v. *Gallagher and Others* (1883), 15 Cox, C. C. 291, *per* Lord COLERIDGE, C.J., at p. 317. The prisoners in this case were members of the "Fenian Brotherhood," whose object was to preserve the freedom of Ireland by force alone. There was evidence to show that one of their number directed the movements of the others, another manufactured nitro-glycerine, whilst others saw to its removal to London. There was also evidence to show the intention of destroying the House of Commons and the Scotland Yard offices, as well as other public buildings. These acts were also held to constitute the offence of levying war (see par. 513).

(*h*) *Mulcahy* v. *R.* (1867), I. R. 1 C. L. 12; (1868) L. R. 3 H. L. 306.

(*i*) *R.* v. *Davitt and Another* (1870), 11 Cox, C. C. 676, 681, 683. It is treason felony if the arms are intended to be used in subverting the Sovereign's authority (*ibid.*, 682).

(*k*) *Ibid.*, 683.

(*l*) *R.* v. *Deasy and Others* (1883), 15 Cox, C. C. 334. Other principles relating to overt acts, which are the same generally in treason felony as in treason, are treated of at pp. 351, 352, *ante*.

(*m*) These words appear to apply equally to levying war as to deposing the Sovereign. This view would seem to be borne out by the words at the end of the section, "and such compassings . . . or any of them to express."

(*n*) Treason Felony Act, 1848 (11 & 12 Vict. c. 12), s. 3, as partially repealed by the Statute Law Revision Acts, 1891 and 1892 (54 & 55 Vict. c. 67, s. 1, Schedule; 55 & 56 Vict. c. 19, s. 1, Schedule).

(*o*) See p. 354, *ante*.

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such as the overthrow of the Government in any part of His Majesty's dominions, or to frighten either House of Parliament into doing what they would not otherwise have done, to constitute the act a felony (*p*).

To constitute the offence of compassing to levy war, it is sufficient to show an intention to use violent measures directed against either the property of the Sovereign or the public, or the lives of the Sovereign's subjects, for some public purpose, and not from private spite or enmity against any particular subject (*q*). Thus, the manufacture of explosives, with the intent to destroy public and other buildings, in order to obtain by force a separate government for Ireland, has been held to be within the section (*r*). Nor is it necessary that there should be an assembly in force, since the means of science have in many cases enabled one man to perform the same work as many (*s*).

Evidence.

Indictment.

514. In an indictment for any of the above felonies any number of overt acts may be charged (*t*); and if some, though not all, of the overt acts alleged are sufficient and sufficiently charged, a conviction will be sustained (*a*).

The indictment will not be bad if the overt acts alleged amount to treason (*b*), and the person charged will not on that account be entitled to be acquitted of the felony (*c*). But no person tried for any of the above felonies may afterwards be prosecuted for treason upon the same facts (*d*).

Punishment.

515. In the case of any of the above felonies every principal in the second degree, and every accessory before the fact, is punishable in the same manner as the principal in the first degree is punishable by the Act (*e*); and every accessory after the fact to any such felony

(*p*) Under the Treason Felony Act, 1848 (11 & 12 Vict. c. 12), s. 3 (*R.* v. *Gallagher and Others* (1883), 15 Cox, C. C. 291, *per* Lord COLERIDGE, C.J., at pp. 317, 318); see also *R.* v. *Mulcahy* (1867), I. R. 1 C. L. 12; *R.* v. *Meaney* (1867), I. R. 1 C. L. 500. As to the principles relating to overt acts in treason, which are the same generally in treason felony, see p. 351, *ante*.

(*q*) *R.* v. *Gallagher and Others, supra, per* Lord COLERIDGE, C.J., at p. 317.

(*r*) *Ibid.*

(*s*) *Ibid.* As to other principles relating to levying war, see pp. 348, 355, *ante*.

(*t*) Treason Felony Act, 1848 (11 & 12 Vict. c. 12), s. 5.

(*a*) *Mulcahy* v. *R.* (1867), I. R. 1 C. L. 12; (1868) L. R. 3 H. L. 306. Here the overt acts charged were "combining, conspiring, confederating, and agreeing" with certain named persons, and with divers others, to raise insurrection etc. Judgment was sustained, though some only, and not all, of the acts alleged were proved; as to overt acts, see also p. 351, *ante*.

(*b*) Treason Felony Act, 1848 (11 & 12 Vict. c. 12), s. 7.

(*c*) *Ibid.*

(*d*) *Ibid.* As to indictments generally, see title CRIMINAL LAW AND PROCEDURE.

(*e*) Treason Felony Act, 1848 (11 & 12 Vict. c. 12), s. 8. See also *R.* v. *Meaney, supra*. Here the person charged was an active member of an association in America connnected with branch associations in Ireland. No overt act was committed by the prisoner himself (though such were committed by members in Ireland), nor had he been in Ireland at any time during the existence of the association in Ireland or America (*ibid.*, 513).

is on conviction liable to be imprisoned with or without hard labour for any term not exceeding two years (*f*).

At the trial of any of the above felonies the court may not order payment to the prosecutor or witnesses of any costs incurred in preferring or prosecuting the indictment (*g*).

Any person convicted of any of the above felonies may be sentenced to penal servitude for life, or for any period not less than three years, or to imprisonment for any term not exceeding two years with or without hard labour (*h*).

(5) *Treasonable Offences.*

Treasonable offences.

516. In addition to the offences constituting treason and treason felony certain offences in the nature of treason have been made punishable with death, various terms of imprisonment, or with the penalty of a *præmunire*.

Setting fire to arsenals, ships of war etc.

The offence of wilfully and maliciously setting on fire or burning, or otherwise destroying His Majesty's arsenals, magazines, dockyards, vessels of war, and certain other Government property (*i*), or causing, aiding, procuring, abetting, or assisting such burning or destruction is punishable with death (*k*).

Various offences.

517. Certain offences with relation to obtaining bulls, excommunications, and other matters from the see of Rome (*l*), affirming

The charge was held good by six of the Irish judges against four because "in the case of conspiracy, as also in the case of treason, there are no accessories, all are principals" (*ibid.*, *per* WHITESIDE, C.J., at pp. 553—4).

(*f*) Treason Felony Act, 1848 (11 & 12 Vict. c. 12), s. 8.

(*g*) *Ibid.*, s. 10.

(*h*) Treason Felony Act, 1848 (11 & 12 Vict. c. 12), s. 3, as amended by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 1.

(*i*) The Act also includes His Majesty's ships or vessels of war, whether afloat or building or begun to be built in any of His Majesty's dockyards, or building or repairing by contract in any private yards, for the use of His Majesty, or any of His Majesty's rope yards, victualling offices, or any of the buildings erected therein or belonging thereto; or any timber or materials there placed for building, repairing, or fitting out of ships or vessels; or any of His Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval, or victualling stores or other ammunition of war is, are, or shall be kept, placed, or deposited.

(*k*) The Dockyards Protection Act, 1772 (12 Geo. 3, c. 24), s. 1, and see titles CRIMINAL LAW AND PROCEDURE; SHIPPING AND NAVIGATION. The Act applies to offences within the realm, or in any of the islands, countries, forts, or places thereunto belonging (*ibid.*). Any person committing any of the enumerated offences in any place out of the realm, may be indicted and tried for the same either in any shire or county within the realm in like manner and form as if the offence had been committed within such shire or county, or in the island, country, or place where the offence was actually committed, as His Majesty may deem most expedient (*ibid.*, s. 2). The offence is expressed to be punishable as a felony without benefit of clergy, and the death penalty on convictions of felony was abolished in all cases, except for felonies excluded from the benefit of clergy prior to the 14th November, 1826, or made punishable with death by statute passed after that date (see the Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28), s. 7; as to Ireland, the Criminal Law (Ireland) Act, 1828 (9 Geo. 4, c. 54), s. 13). Piracy with violence is punishable with death under the Piracy Act, 1837 (7 Will. 4 & 1 Vict. c. 88), s. 2.

(*l*) See the statutes of 1533–4 (25 Hen. 8, cc. 19, 20, 21); 1536 (28 Hen. 8,

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the power of Parliament to legislate without the Crown (*m*), or the right of any person to the Crown other than persons in the present line of succession (*n*), or denying the right of the Crown and Parliament to limit the succession to the Crown (*o*), together with certain offences connected with assisting at royal marriages (*p*), and refusing to confirm, invest, and consecrate a bishop when nominated by the Crown (*q*), are made punishable with the penalty of a *præmunire* (*r*).

Attempts to injure the Sovereign etc.

518. Certain offences of a treasonable nature are also made punishable by various terms of penal servitude or imprisonment. Such offences relate to attempts to injure or alarm the Sovereign by aiming or discharging firearms, striking or attempting to strike the person of the Sovereign or the like (*s*), riotously pulling down churches, chapels, meeting-houses, and other buildings (*t*), tumultuously petitioning the Crown or either House of Parliament (*a*),

c. 16); 1 Eliz. c. 1; 3 Eliz. c. 2; Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59).

(*m*) See the statute 1661 (13 Car. 2, stat. 1, c. 1), and p. 388, *post*.

(*n*) See the Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.), and p. 350, *ante*.

(*o*) *Ibid*.

(*p*) See p. 371, *post*.

(*q*) 1533–4 (25 Hen. 8, c. 20), s. 7.

(*r*) As to the penalty of *præmunire*, see note (*e*), p. 323, *ante*.

(*s*) Treason Act, 1842 (5 & 6 Vict. c. 51), s. 2, as partially repealed by the Statute Law Revision Act (No. 2), 1888 (51 & 52 Vict. c. 57), s. 1; and the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), s. 1. The offences named are to wilfully discharge or attempt to discharge, or point, aim or present, at or near to the person of the Sovereign, any gun, pistol, or any other description of firearms, or other arms whatsoever, whether containing any explosive or destructive material or not; or to discharge, cause to be discharged, or attempt to discharge any explosive substance or material near the person of the Sovereign; or to wilfully strike or strike at or attempt to strike or strike at the person of the Sovereign with any offensive weapon, or in any other manner whatsoever; or to wilfully throw or attempt to throw any substance, matter, or thing whatsoever at or upon the person of the Sovereign with intent in any of such cases to injure his person, or to alarm him, or to break the public peace, or whereby the public peace may be broken; or to wilfully produce or have near the person of the Sovereign any gun, pistol, or any other firearms or other arms whatsoever, or any explosive, destructive, or dangerous matter or thing whatsoever, with intent to use the same to injure the Sovereign's person, or to alarm him. Any of these offences is a high misdemeanour, and on conviction thereof a person may be sentenced at the discretion of the court to imprisonment (no term is named by the Act), and during such imprisonment to be publicly or privately whipped not more than thrice, in such manner and form as the court directs. Nothing in these provisions is to alter the punishment which may be inflicted for treason or misprision of treason (*ibid.*, s. 3).

(*t*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 11, as partially repealed by the Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54), s. 1; and see title CRIMINAL LAW AND PROCEDURE.

(*a*) 13 Car. 2, stat. 1, c. 5. Under this Act it is an offence, punishable by fine not exceeding £100 and not more than three months' imprisonment, to solicit, labour, or procure the getting of the hands or consent of more than twenty persons to any petition, complaint, or remonstrance addressed to the King or both Houses or either House of Parliament for the alteration of matters established by law in Church or State unless with the consent of three or more justices of the county where the matter arises at the assizes or general quarter sessions, or, in London, of the Lord Mayor, aldermen, and commons, in common council

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inciting soldiers and sailors to mutiny (*b*), assisting prisoners of war to escape (*c*), the formation of secret societies and the administering of unlawful oaths (*d*), unauthorised drilling and practising military exercises (*e*), offences connected with the composing, printing, and publishing of seditious libels (*f*), riding armed secretly with men at arms to take or restrain others (*g*), and riding armed by night or day in fairs or markets, or in the presence of the justices, or other ministers, or in any part elsewhere (*h*).

Riding armed.

Part IV.—The Royal Family.

SECT. 1.—*Members of the Royal Family.*

519. For certain statutory purposes the Royal Family is limited to the descendants of the body of George II. (*i*), and as such now comprises His Majesty King Edward VII. and the descendants of the following persons:—(1) His Majesty King Edward VII.; (2) the late Queen Victoria; (3) the first Duke of Cumberland and Teviotdale, fifth son of George III. and King of Hanover (*j*); (4) the first Duke of Cambridge, seventh son of George III. and uncle of the late Queen Victoria (*k*).

The Royal Family.

assembled; or to repair to His Majesty, or to both Houses or either House of Parliament, upon pretence of delivering a petition with more than ten persons at any one time. The offence must be prosecuted within six months, and proved by two credible witnesses. See also title PARLIAMENT.

(*b*) See Incitement to Mutiny Act, 1797 (37 Geo. 3, c. 70), made perpetual by the Incitement to Mutiny Act, 1817 (57 Geo. 3, c. 7), and partially repealed by the Statute Law Revision Act, 1871 (34 & 35 Vict. c. 116). As to punishment, see also the Punishment of Offences Act, 1837 (7 Will. 4 & 1 Vict. c. 91), s. 1, partially repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

(*c*) Prisoners of War (Escape) Act, 1812 (52 Geo. 3, c. 156).

(*d*) See Unlawful Societies Act, 1799 (39 Geo. 3, c. 79); Seditious Meetings Act, 1817 (57 Geo. 3, c. 19); Unlawful Oaths Act, 1797 (37 Geo. 3, c. 123). See title CRIMINAL LAW AND PROCEDURE.

(*e*) See Unlawful Drilling Act, 1819 (60 Geo. 3 & 1 Geo. 4, c. 1), and title ROYAL FORCES.

(*f*) See title LIBEL AND SLANDER. As to a document inciting to murder foreign sovereigns, or calculated to disturb foreign governments, see *R.* v. *Antonelli and Barber* (1905), 70 J. P. 4.

(*g*) See the Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2).

(*h*) Statute of Northampton, 1328 (2 Edw. 3, c. 3). An exception is made by the Act in favour of the King's servants in his presence, and his ministers in the execution of his precepts or their office, and persons of their company or assisting them, also upon a cry made for arms to keep the peace (*ibid.*). This statute is declaratory only of the common law (compare *Knight's (Sir John) Case* (1686), 3 Mod. Rep. 117), and a person discharging firearms in a public street may be indicted thereunder. See *R.* v. *Meade* (1903), 19 T. L. R. 540, *per* WILLS, J.

(*i*) For the purposes of the Royal Marriage Act, 1772 (12 Geo. 3, c. 11), see p. 370, *post*. As to the persons to whom the authority of the King extends at common law, see p. 364, *post*.

(*j*) As to the title to the throne of Hanover, see note (*b*), p. 361, *post*.

(*k*) For a list of the various descendants, see Burke's Peerage, ed. 1908.

SECT. 2.
The King or Queen Regnant.

SECT. 2.—*The King or Queen Regnant.*

SUB-SECT. 1.—*Style and Titles.*

Alterations in royal title.

520. Alterations or additions to the royal style and titles are made under statutory authority, and are customarily announced to the nation by proclamation (*l*).

Royal style and titles.

521. The present royal style and titles (*m*) are—"Edward VII. by the Grace of God of the United Kingdom of Great Britain (*n*) and Ireland (*o*) and of the British Dominions beyond the Seas King, Defender of the Faith (*p*), Emperor of India."

The King also bears the title of Earl of Dublin, which is inheritable by future Kings (*q*), and is Duke of Lancaster by inheritance (*r*), whilst the title of Duke of Cornwall vests in him until the birth of an Heir Apparent, when it shifts to the latter (*s*). As to Lancaster (and *semble* as to Cornwall also) the title of Duke merges, it is said, in that of King (*t*).

Though the style of "Emperor" is not assumed by the Sovereign except with regard to India (*u*), the King's Majesty is declared to

(*l*) This is the present practice, though formerly, it seems, additions have been made without statutory authority (see *infra*). The titles borne by Queen Victoria until 1876, when the style of "Empress of India" was added (see note (*u*), *infra*), were those established by proclamation of George III., under the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 1 (see the *London Gazette*, 3rd January, 1801). As to the confirmation of the title of "Defender of the Faith" by Parliament in the reign of Henry VIII., see note (*p*), *infra*.

(*m*) The latest addition to the title was authorised by the Royal Titles Act, 1901 (1 Edw. 7, c. 15), which, with a view to the recognition of the colonial possessions, empowered His present Majesty by proclamation to make such additions to the royal style and titles then appertaining to the Imperial Crown of the United Kingdom and its dependencies as to His Majesty might seem fit. The present title was announced by proclamation of 4th November, 1901 (see the *London Gazette* of that date), the words "and of the British Dominions beyond the Seas" being added to the former titles.

(*n*) The title "Magnæ Britanniæ" was first assumed by James I. in an edict to foreign princes (see Reliquiæ Spelmannianæ, 241).

(*o*) The title "Dominus Hiberniæ" was first assumed by Edward IV., his titles being "Rex Angliæ et Franciæ et Dominus Hiberniæ." This was subsequently changed by Henry VIII. to "Rex Angliæ et Franciæ et Hiberniæ" (Reliquiæ Spelmannianæ, 241).

(*p*) The title of "Defensor Fidei" was conferred by Pope Leo X. upon Henry VIII. as a reward for the latter's book against Luther (the authenticity of which has been doubted). The title was subsequently confirmed by Pope Clement VII., but withdrawn when Henry VIII. was deposed by papal bull. The title was, however, subsequently confirmed by stat. 35 Hen. 8, c. 3, repealed by 1 & 2 Phil. & Mar. c. 8, s. 4. It has been said by some writers that the title was used prior to the reign of Henry VIII. (see Oldmixon's History of England, ed. 1739, 35, 36; Reliquiæ Spelmannianæ, 241. For the bull conferring the title, see Lord Herbert's Life and Reign of Henry VIII., ed. 1521, 95).

(*q*) Queen Victoria conferred this title by letters patent in 1849 upon His present Majesty, then Prince of Wales, and his heirs, "Kings of Great Britain and Ireland" (see the *London Gazette*, 11th September, 1849).

(*r*) As to the history of the title to the Duchy, see Vol. VII., Part VII., sect. 4.

(*s*) See p. 368, *post*. As to the Duchy generally, see Vol. VII., Part VII., sect. 4.

(*t*) *Case of the Duchy of Lancaster* (1561), Plowd. 212. See also the s. c. No. lxxxiv. (5th Century) Jenk. 224, *nomen ducis mergitur in nomine regis*.

(*u*) The style of "Empress of India" was assumed by Queen Victoria by

be "Imperial," and his dominions an "Empire," by various statutes (*a*).

The King may not rule his subjects as King of any foreign country (*b*), but only as King of England and the dominions belonging thereto as expressed in the royal title (*c*).

SUB-SECT. 2.—*Royal Ensigns and Armorial Flags and Banners.*

Royal arms.

522. The royal arms or ensigns armorial of the United Kingdom and the British dominions are quarterly, the first and fourth being the arms of England, the second of Scotland, and the third of Ireland (*d*).

Licence to use.

523. Licences may be granted by the Crown to use the royal arms (*e*). But a grant of a patent under the Patents and Designs Act, 1907, is not to be deemed to authorise the patentee to use

proclamation of 28th April, 1876, under the Royal Titles Act, 1876 (39 & 40 Vict. c. 10), with a saving, however, as to all charters, commissions, letters patent, grants, writs, appointments, and other like instruments not extending in their operation beyond the United Kingdom (see the *London Gazette*, 28th April, 1876).

(*a*) See stat. 24 Hen. 8, c. 12; Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2); Royal Titles Act, 1876 (39 & 40 Vict. c. 10); Royal Titles Act, 1901 (1 Edw. 7, c. 15). The preamble to the statute 24 Hen. 8, c. 12, commences: "Whereas by divers sundry old authentic histories and chronicles, it is manifestly declared and expressed that this realm of England is an Empire, and so hath been accepted in this world, governed by one supreme head and King, having the royal estate and dignity of the Imperial Crown of the same," etc.

(*b*) George I. was Elector of Hanover, and the title of "King of Hanover" was assumed by George III. and borne by succeeding Sovereigns until the accession of the late Queen Victoria in 1837, when, owing to the operation of the Salic law, the Duke of Cumberland, fifth son of George III., became King of Hanover.

(*c*) As to the statutory provisions relating to foreign influence, see p. 381, *post*. When Edward III. claimed the throne of France, it was feared that England might become an appendage of that country; hence it was enacted by the statute 14 Edw. 3, stat. 5, that "the realm of England and the people thereof should not at any time to come be put in subjection nor in obeisance of the King, his heirs or successors as Kings of France." The ancient claim of the Crown to the throne of France was preserved by the Bill of Rights, 1688, and the Act of Settlement, 1700 (1 Will. & Mar. Sess. 2, c. 2), which purported to confer "the imperial Crown and dignity of the realms of England, France, and Ireland" (see note (*n*), p. 321, *ante*, and p. 322, *ante*). The style and title of King of France was retained by the various Kings and Queens of England from Edward III. down to George III., when it was discontinued by his proclamation announcing the royal title (see note (*l*), p. 360, *ante*.

(*d*) Proclamations of the 1st January, 1801, as amended by proclamation of 26th July, 1837 (see Stat. R. & O. Rev., Vol. I., Arms, pp. 1, 8), issued under the authority of the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 1, which empowered the Crown to appoint by proclamation the ensigns armorial and the flags and banners of the United Kingdom and the dependencies thereto belonging. By the first proclamation the fleur-de-lys of France quartered by Edward III. were directed to be omitted, and the escutcheon representing the arms of Hanover was to be ensigned with the Electoral bonnet. In 1816 George III. assumed the title of King of Hanover, and the bonnet was replaced by the crown. On the accession of Queen Victoria the Duke of Cumberland became King of Hanover (note (*b*), *supra*), and the arms of Hanover were directed to be omitted from the royal arms by a proclamation of 26th July, 1837.

(*e*) Under the Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 2, Sched. I., letters patent of any franchise, liberty, or privilege to any person or body

SECT. 2. The King or Queen Regnant.

the royal arms, or to place the royal arms on any patented article (*f*), and any person who without His Majesty's authority uses the royal arms (or arms so nearly resembling them as to be calculated to deceive) in connection with any business, trade, calling, or profession, in such a manner as to be calculated to lead to the belief that he is duly authorised so to do, is liable to a fine not exceeding £20 on summary conviction (*g*).

Royal Standard.

524. The Royal Standard is the personal flag of the Sovereign, and cannot properly be flown without His Majesty's permission, which is, it seems, only granted when either the King or Queen is present (*h*).

Union Jack.

525. The Union flag (or Union Jack), which is directed to be used in all His Majesty's flags, banners, standards, and ensigns, both at sea and on land (*i*), is azure, the crosses saltire of St. Andrew and St. Patrick quarterly per saltire, countercharged argent and gules; the latter fimbriated of the second, surmounted by the cross of St. George, of the third, fimbriated as the saltire (*k*).

Unless authorised by warrant from the Crown or from the Admiralty, ships or boats belonging to any British subject are prohibited from hoisting any distinctive national colours (except the red ensign (*l*), or except the Union Jack with a white border),

politic or corporate are subject to an impressed stamp duty of £30; whilst the grant of arms or armorial ensigns only, under the sign manual, or by any of the Kings of Arms of England, Scotland, or Ireland, is subject to an impressed stamp duty of £10.

(*f*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 90 (1).

(*g*) *Ibid.*, s. 90 (2). But nothing in this provision is to be construed to affect the rights (if any) of a proprietor of a trade mark containing such arms to continue to use such trade mark (*ibid.*). Lists of the persons authorised to use the royal arms are published occasionally in the *London Gazette* (*e.g.*, *London Gazette*, 27th January, 1885, 360—362). And see title TRADE MARKS AND DESIGNS.

(*h*) See *per* the Earl of Crewe in answer to a question put to His Majesty's Government in the House of Lords (Parl. Deb. 4th Ser. vol. CXCII., 579, 580.

(*i*) Union with Scotland Act, 1706 (6 Ann. c. 11; 5 & 6 Ann. c. 8, Ruff.), art. 1. By Order in Council, 9th July, 1864, the classification of His Majesty's ships under the denomination of the red, white, and blue squadrons was discontinued, and it was directed that in future the white ensign should be used by all His Majesty's ships in commission, the blue ensign by merchant ships commanded by officers of the Royal Naval Reserve with permission of the Admiralty, and the red ensign by all other ships belonging to His Majesty's subjects (see Stat. R. & O. Rev., Vol. I., Arms. As to the use of the red ensign by British subjects, see the text, *infra*).

(*k*) Proclamation, 1st January, 1801 (Stat. R. & O. Rev., Vol. I., Arms, p. 1), under the authority of the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 1.

(*l*) The red ensign usually flown by merchant ships, without any defacement or modification whatsoever, is declared to be the proper national colours for all ships and boats belonging to any British subject, except in the case of His Majesty's ships or boats, or ships or boats allowed to use any other national colours in pursuance of a warrant from the Crown or from the Admiralty (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 73 (1)). As to the occasions on which the proper national colours must be hoisted and the penalty for default, see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 74; and generally hereon see titles ADMIRALTY, Vol. I., at p. 77; SHIPPING AND NAVIGATION.

or any colours usually worn by His Majesty's ships, or resembling those of His Majesty, or the pendant usually worn by His Majesty's ships or any pendant resembling the same, and the master of the ship or boat, or the owner of the same if on board, and every other person hoisting the colours or pendant, are liable to a fine for each offence not exceeding £500 (*m*). The Union Jack may be flown on land by every citizen in the Empire, as well as on Government buildings (*n*).

Special flags.

526. Special flags are appointed to be used by the Preventive Service (*o*); and merchant ships whilst commanded by officers of the Royal Naval Reserve with permission of the Admiralty (*p*), and the Lord Lieutenant of Ireland whilst on board His Majesty's ships (*q*), are entitled to use distinctive flags.

SUB-SECT. 3.—*Who is King Regnant.*

King regnant

527. Every King for the time being, whether he be an usurper or not, is a King regnant and is protected by the law of treason (*r*), and references in statutes to the reigning Sovereign are to be construed as references to the Sovereign for the time being, unless the contrary intention appears (*s*).

SUB-SECT. 4.—*The Queen Regnant.*

Queen regnant.

528. The status of a Queen regnant is the same as that of a King; she may exercise the regal power as fully in all respects as a King regnant, and the mention of the King in statutes includes a Queen regnant (*t*).

SUB-SECT. 5.—*Natural and Political Capacities of the Sovereign.*

Attributes of Sovereign.

529. The special privileges and prerogatives (*u*) allowed by the law to the Sovereign are attributed to him primarily in his regal

(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 73 (2); see also Proclamation 1st January, 1801 (Stat. R. & O. Rev., Vol. I., Arms, p. 1). As to the forfeiture of colours used in contravention of this provision, the prosecution of offences, and recovery of fines etc., see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 73 (3)—(5).

(*n*) See the reference in note (*h*), on p. 362, *ante*.

(*o*) See Order in Council 1st February, 1817 (Stat. R. & O. Rev., Vol. I., Arms, p. 6).

(*p*) See Order in Council, 9th July, 1864, under which the blue ensign may be flown by such ships. See also note (*i*), on p. 362, *ante*.

(*q*) A royal warrant of 23rd March, 1821, was issued to the Admiralty notifying them that the Union flag charged in the centre with the escutcheon of the arms of Ireland should be appointed to the Lord Lieutenant for the purpose of distinguishing his presence when on board His Majesty's ships (see Stat. R. & O. Rev., Vol. I., Arms, p. 8).

(*r*) 3 Co. Inst. 7; Bac. Abr. tit. Prerog. A.; and see stat. 11 Hen. 7, c. 1, and p. 339, *ante*. It is said that the rightful heir out of possession is not protected by the Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2) (see 3 Co. Inst. 7). As to treason generally, see p. 345, *ante*.

(*s*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 30. This Act is binding on the Crown (*ibid.*).

(*t*) *Ibid.*

(*u*) As to the prerogative generally, see p. 371, *post*.

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capacity or body politic (*a*). But it appears that, in general, such privileges and prerogatives attach to the King also in his natural capacity (*b*), the greater drawing to itself the less, and imbuing it, as it were, with its qualities (*c*). Thus in legal contemplation the Sovereign is never a minor (*d*), though regents are usually appointed when he is of tender years (*e*); and grants and leases made by the Sovereign during infancy are valid, and cannot afterwards be avoided (*f*). So also in legal contemplation the King never dies (*g*), and the mention of the Sovereign in statutes includes successors. Allegiance is, moreover, due to the Sovereign in his natural body as in his political capacity (*h*); but in questions relating to rights of property, where the King takes in his natural capacity under a gift from a subject, the full prerogative rights do not, it seems, in all cases apply (*i*).

Crown private estates.

530. Estates belonging to the Sovereign in his private capacity are defined by statute, and may be dealt with freely by him (*k*). Such statutory private lands and hereditaments are, however, subject to taxation (*l*).

Crown lands.

Estates vested in the Sovereign in his body politic are subject to statutory restrictions on alienation, and the greater portion are now managed as part of the national revenues (*m*); they are not, in general, subject to taxation (*n*).

SUB-SECT. 6.—*Education and Care of the Royal Family.*

Sovereign's authority over Royal Family.

531. At common law the education and care of the members of the Royal Family, and the right of appointing their governors, instructors, and other servants, as well as the approbation of their marriages, belongs to the King, and this right extends at least as far as to grandchildren and the heir presumptive (*o*), whilst instances

(*a*) See *Case of the Duchy of Lancaster* (1561), Plowd. 212, 213.

(*b*) See pp. 371 *et seq.*, *post*.

(*c*) "For when the royall bodie politique of the King doth meete with the naturall capacity in one person, the whole bodie shall have the qualitie of the royall bodie politique, which is the greater and more worthy and wherein is no minoritie" (Co. Litt. 43 a, b; *Case of the Duchy of Lancaster* (1561), Plowd. 212, 213; see also *Willion* v. *Berkley* (1561), Plowd. 223, 224). As to the natural and political capacity of the Sovereign with regard to the practice on petition of right, see title CROWN PRACTICE.

(*d*) Co. Litt. 43 a, b, *Case of the Duchy of Lancaster, supra*, and see p. 375, *post*.

(*e*) As to regencies generally, see p. 376, *post*.

(*f*) Bac. Abr. Prerog. A; *Calvin's Case* (1608), 7 Co. Rep. 12; *Case of the Duchy of Lancaster, ante;* see also pp. 476, *et seq.*, *post*.

(*g*) See p. 375, *post*. The King dies *in hoc individuo*, but not *in genere* (*Calvin's Case* (1608), 7 Co. Rep. 1, 10 b).

(*h*) See p. 339, *ante*.

(*i*) See also p. 493, *post*.

(*k*) See Vol. VII., Part VII., sect. 6.

(*l*) Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), ss. 6, 7; and see Vol. VII., Part VII., sect. 6.

(*m*) See Vol. VII., Part VII., and title REVENUE.

(*n*) See Vol. VII., Part VII.

(*o*) This question was proposed to the judges by George I. in 1717, and ten out of twelve gave it as their opinion that the King's right of supervision extended to his grandchildren and the heir presumptive whilst minors, and that he had the right to approve their marriages, when they were grown up (see Fortes. Rep.

are to be found of its reaching to nephews and nieces and more distant collaterals (*p*). These rights as to the marriages of descendants of the body of George II. are now superseded by statutory provisions (*q*).

SECT. 3.—*The Queen Consort.*

SUB-SECT. 1.—*Is a Feme Sole.*

Status of Queen Consort.

532. The wife of the King regnant is styled the "Queen Consort," and is in the eyes of the law a *feme sole*, and can enter into contracts, and sue, and be sued without joining her husband (*r*). Her proper style in suits and actions is, it seems, "Her most sacred Majesty" etc. (using the present style and title belonging to the King) (*s*); and she may, it appears, sue by information, but petition of right to her does not lie (*t*).

As to property.

533. The Queen Consort is also capable of taking, granting, or disposing of property as a *feme sole* (*u*); and she may, during the joint lives of herself and the King, by deed under hand and seal, attested by two or more witnesses, or by last will in writing, signed and published in the presence of and attested by three or more witnesses, dispose of any freehold estate of inheritance, or any copyhold or customary estate belonging to her (whether in trust or otherwise), or any part thereof (*v*).

She is also expressly empowered by last will in writing to give and bequeath all chattels real and personal, and personal estate belonging to her, as freely as if sole and unmarried. But these provisions are not to enable her to dispose of any palace, or capital mansion-house, gardens, lands, or hereditaments belonging to the Sovereign in right of the Crown, and vested in her for her life, by way of jointure, or otherwise, by letters patent or Act of Parliament,

401—440). The same opinion was unanimously given by the judges in 1772 as to children and grandchildren other than the issue of princesses married into foreign families, but to what other branches of the Royal Family the right extended they did not find to have been precisely determined (see Lords' Journal, 28th February, 1772; 1 Bl. Com., 14th ed., 225, 226; and the next note).

(*p*) According to Blackstone the instances of the King's interposition most frequently extend only to nephews and nieces, though examples are to be found of its reaching to more distant collaterals (see 1 Bl. Com., 14th ed., 225, 226), where the authority of Rymers is given for the extension of the King's supervision to brothers and sisters, nephews and nieces, great-nieces, first, second, third and fourth cousins, and to the blood royal in general.

(*q*) See p. 370, *post*.

(*r*) Co. Litt. 133 a, because the King should not be disquieted by the legal proceedings of his wife. See also for suits by the Queen Consort as a *feme sole* Y. B. 11 Hen. 4, p. 67, pl. 26; Y. B. 3 Hen. 7, p. 14, pl. 22; Y. B. 18 Edw. 3, p. 7, pl. 6; stat. 32 Hen. 8, c. 51 (c. 12, private, Ruff.).

(*s*) See Chitty on Pleading, ed. 1831, Vol. II., p. 25.

(*t*) As to informations by the Queen Consort, see *A.-G. to the Prince of Wales* v. *St. Aubyn* (*Sir John*) (1811), Wight. 167, 202; *Floyde's* (*Sir Robert*) *Case* (1618), 2 Roll. Abr. 213. Petition lies only to the King, and not to the Queen Consort or the Prince of Wales (Staundford Prærogative, 75 b).

(*u*) Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), s. 8. This and the following provisions are merely declaratory, it seems, of the common law, by which she was always enabled to perform acts of ownership without the King's concurrence (see 4 Co. Inst. 23 b), and to take a grant from him.

(*v*) Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), s. 9.

SECT. 3. The Queen Consort.

or to make any disposition which she could not make if sole and unmarried (*x*).

SUB-SECT. 2.—*Special Privileges and Prerogatives.*

Special prerogatives.

534. The Queen Consort also enjoys many distinct prerogatives and privileges. She is not subject to any toll, fine, or amercement (*y*), and is entitled to her own courts and officers, and to be represented at the Bar by her own Attorney and Solicitor General, who are entitled to a place within the bar with the King's Counsel (*z*). It is said that her writ does not abate as in the case of an ordinary person, but only as in the case of the King (*a*); nor can she be made to give security for, or to pay, costs (*b*).

Queen-gold.

535. She was formerly entitled to Queen-gold for her own separate use (*c*), but this branch of her revenue fell into disuse when the feudal tenures were abolished in 1660 (*d*). It is also said that when a whale is captured in the narrow seas adjoining the coast, being a royal fish, the head belongs to the King, and the body to the finder, whilst the tail belongs to the Queen (*e*).

Coronation.

The Queen Consort enjoys a separate ceremony on the occasion of the coronation of the King, which may be performed by the Archbishop of York (*f*), and provision is made for her on the death of the King (*g*).

Treason.

The life and chastity of the Queen Consort are protected by the law of treason during her marriage with the King (*h*), and she herself is guilty of treason if she consents to the violation of her chastity (*i*). In other respects she is, in general, an ordinary subject, and amenable to the law of treason if she compasses or imagines the

(*x*) Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), s. 9.

(*y*) Co. Litt. 133 b.

(*z*) Selden, Tit. Hon. 1, 6, 7.

(*a*) Y. B. 18 Edw. 3, pp. 29—31 (Rolls Series); *ibid.*, 17 & 18 Edw. 3, p. 435.

(*b*) 3 Bl. Com., 14th ed., 400; Fitz. Nat. Brev. 101 a; Co. Litt. 133 a.

(*c*) See Prynne's Aurum Reginæ. Queen-gold was due from every person for every gift or oblation, or voluntary fine or obligation, amounting to ten marks or upwards, paid to the King in return for privileges, dispensations, pardons, or other acts of royal grace, and consisted of one-tenth of the amount of the fine or oblation in addition to the fine itself. See *Anon.*, Fortes. Rep. 398.

(*d*) 1 Bl. Com., 14th ed., 192.

(*e*) The reason given for this curious right in the books is that the tail contains whalebone for the Queen's wardrobe, whereas in fact the whalebone is in the head portion (*ibid.*; Prynne, Aurum Reginæ, p. 127). As to royal fish, see Vol. VII., Part VII., sect. 3, sub-sect. 7.

(*f*) The ceremonies performed by the Archbishop of York at the coronation of Her present Majesty, as based on those performed at the coronation of William IV., being the last preceding occasion on which a queen consort was crowned, were—(1) an anointing upon the head; (2) investiture with a ring on the fourth finger of the right hand as the seal of faith; (3) coronation; (4) investiture with two sceptres, as in the case of the King. See Bodley's Coronation of King Edward VII., 447, 448. As to the claim by the Archbishop of York to perform this service, see p. 334, *ante*.

(*g*) Civil List Act, 1901 (1 Edw. 7, c. 4), s. 5; and see Vol. VII., Part VII., sect. 5.

(*h*) Treasons Act, 1351 (25 Edw. 3, stat. 5, c. 2); 3 Co. Inst. 8; and see p. 349, *ante*.

(*i*) Vin. Abr. tit. Prerog. B, e.

death of the King (*k*); in such a case she is, however, entitled to trial by the peers (*l*).

SECT. 4.—*The Husband of the Queen Regnant.*

Husband of Queen regnant.

536. At common law the husband of the Queen regnant is an ordinary subject, and is guilty of treason if he compasses or imagines the death of the Queen (*m*). Moreover, apart from special enactment, he is not protected by the law of treason (*n*); nor has he any special privileges as a litigant (*o*). Special privileges are, however, usually conferred upon him by statute or letters patent. Thus, Prince Albert of Saxe-Coburg and Gotha was naturalised by statute (*p*), and introduced to, but not made a member of, the Privy Council (*q*). He was also invested by Queen Victoria with precedence next to herself (*r*), and created Prince Consort by letters patent in 1857 (*s*).

SECT. 5.—*The Queen Dowager.*

The Queen dowager.

537. On the death of the King regnant the Queen Consort becomes the Queen dowager, and ceases to be protected by the Statute of Treasons, because any attempt upon her life or chastity would no longer endanger the succession (*t*).

It is stated that the King's licence is required before she can remarry (*u*). But if she does so she does not lose her style and dignity, as dowager peeresses do if commoners by birth (*x*). In other respects, it is said, the Queen dowager retains most of the privileges which she enjoyed as Queen Consort (*a*).

(*k*) 3 Co. Inst. 8.

(*l*) As in the case of Anne Boleyn, wife of Henry VIII.

(*m*) 3 Co. Inst. 8.

(*n*) 3 Co. Inst. 7.

(*o*) For an action by the consort of the Queen in the ordinary form, see *Prince Albert* v. *Strange* (1849), 1 Mac. & G. 25, which was a bill filed against certain persons for the infringement of copyrights belonging to Prince Albert and the Queen respectively, the Attorney-General being joined as co-defendant and an information also filed by the latter on behalf of the Crown.

(*p*) 3 & 4 Vict. c. 2.

(*q*) Under the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), persons born out of the United Kingdom or the dominions thereunto belonging, although naturalised or made denizens (except such as were born of British parents) were rendered incapable of becoming Privy Councillors or members of either House of Parliament, or from enjoying any office or place of trust, civil or military, or from taking grants of land from the Crown. This provision was repealed as to persons naturalised, and as to taking grants of land, in so far as inconsistent with the provisions of the statute 7 & 8 Vict. c. 66, by that Act, and is now virtually repealed as to persons naturalised, and as to the holding of land by aliens, by the Naturalization Act, 1870 (33 & 34 Vict. c. 14).

(*r*) See the *London Gazette*, 6th March, 1840.

(*s*) See the *London Gazette*, 26th June, 1857, p. 2195.

(*t*) 1 Bl. Com., 14th ed., 222.

(*u*) This is so stated by Coke, who cites a statute (8 Hen. 6, No. 7, or 6 Hen. 6, No. 41) in 2 Co. Inst. 18. But there seems to be some doubt whether this statute ever existed. See Co. Litt. 133 b; 1 Bl. Com., 14th ed., 222.

(*x*) 2 Co. Inst. 50; 1 Bl. Com., 14th ed. 222. Though an alien born, the Queen dowager was always entitled to dower (Bl. Com., *supra;* Co. Litt. 31).

(*a*) 1 Bl. Com., 14th ed., 222. But *quære* to what privileges precisely this principle extends.

SECT. 6.
The Prince and Princess of Wales.

SECT. 6.—*The Prince and Princess of Wales.*

SUB-SECT. 1.—*Titles of the Heir Apparent.*

Titles.

538. The eldest son of the reigning monarch is the heir apparent, and is invariably created Prince of Wales and Earl of Chester by letters patent, these titles not being inheritable (*b*). The King's eldest son (*c*), being heir apparent, is also Duke of Cornwall in the peerage of England, by inheritance (*d*), the title vesting in him immediately he is born (*e*). On the death of the heir apparent leaving a son, the title and possessions of the Duchy do not vest in the latter, but revert to the Crown (*f*). For although the eldest son of the heir apparent becomes himself heir apparent on the death of his father, yet, not being the eldest son of the King, he is not within the limitations of the charter (*g*).

Other titles inherited by the heir apparent are those of Duke of Rothesay, Earl of Carrick, and Baron of Renfrew in the peerage of Scotland, Lord of the Isles and Great Steward of Scotland (*h*), Prince of Saxe-Coburg and Gotha and Duke of Saxony.

SUB-SECT. 2.—*Status and Privileges.*

Treason.

539. The person of the King's eldest son and the chastity of his wife are protected by the law of treason (*i*), and it is said that these provisions extend to the heir apparent whether he be the first-born son or not, but not if he be a collateral (*k*).

Apart from the special privileges which he enjoys as Duke of Cornwall (*l*), the provision made for him and his wife by the Civil

(*b*) 4 Co. Inst. 243; 1 Bl. Com., 14th ed., 194. The title of Prince of Wales was originated by Edward I., who conferred it upon his second son, Edward, on the conquest of Wales in 1284. See Hume, Hist. of Eng., Vol. II. 243. The present Prince of Wales was also created Baron Killarney, Earl of Inverness, and Duke of York by letters patent of the 21st May, 1892, but these titles are not necessarily conferred upon the heir apparent.

(*c*) There is a conflict of opinion as to whether the word *primogenitus* in the charter by which Edward III. conferred the Duchy upon the Black Prince is confined to first-born sons, or whether it includes the eldest surviving son. The former opinion is expressed by Coke (see *The Prince's Case* (1605), 8 Co. Rep. 30 a); the contrary is affirmed by Lord HARDWICKE (see *Lomax* v. *Holmden* (1749), 1 Ves. Sen. 290, at p. 294), who cites Henry VIII. and Edward VI. as instances of second sons taking by inheritance.

(*d*) *The Prince's Case* (1605), 8 Co. Rep. 1. The Black Prince was originally created Duke of Cornwall by charter of Edward III. in 1337. As to the title to the Duchy generally, see Vol. VII., Part VII., sect. 4.

(*e*) See Com. Dig. tit. Roy. G.

(*f*) Thus, on the death of the Black Prince in the life of Edward III. his son Richard did not take the title by descent, but was created Duke of Cornwall by special charter (*The Prince's Case*, *supra*, 30 a; and see Com. Dig. tit. Roy. G; 1 Hale, P. C. 125, 126).

(*g*) For the limitations of the charter, see Vol. VII., Part VII., sect. 4.

(*h*) These titles are inherited under an Act of the Scottish Parliament, 27th November, 1469 (see Acts of the Parliaments of Scotland, Jac. 3, Appendix III., p. 187). As to the principality of Scotland generally, see Vol. VII., Part VII., sect. 4.

(*i*) See p. 349, *ante*. The provision as to his wife applies only during coverture, and not when she is divorced or after his death (see *ibid.*).

(*k*) 3 Co. Inst. 8, 9.

(*l*) See as to these, Vol. VII., Part VII., sect. 4.

List Act, 1901 (*m*), the statutory regulations made with regard to the management and control of his establishment (*n*), the right of precedence enjoyed by all children of the reigning Sovereign (*o*), and the restrictions as to marriage imposed upon certain members of the Royal Family (*p*), the Prince of Wales and his wife occupy in general the same legal status as ordinary subjects (*q*).

Acts of Parliament relating to the Prince of Wales are public statutes of which judicial notice is taken (*r*).

SECT. 7.—*The Princess Royal.*

The Princess Royal.

540. The eldest daughter of the reigning Sovereign is generally styled the "Princess Royal," and may be heiress presumptive, but cannot be heiress apparent, since her right to succeed is always liable to be defeated by the birth of a brother (*s*). The Princess Royal is not usually created Princess of Wales (*t*). It is treason to violate the chastity of the King's eldest daughter, being unmarried (*u*).

(*m*) 1 Edw. 7, c. 4. See Vol. VII., Part VII., sect. 5.

(*n*) Heir Apparent's Establishment Act, 1795 (35 Geo. 3, c. 125). Under this Act, within fourteen days of an establishment being made for the heir apparent (this refers, *semble*, to the provision invariably made for him by statute; see Vol. VII., Part VII., sect. 5), the principal officer or officers of the Prince are directed to make out a plan of his establishment, showing estimated disbursements etc. (*ibid.*, s. 1). Books relating to the Prince's expenditure are to be kept by the principal officer or treasurer, quarterly accounts made up, and payments made by him under a warrant by privy seal of the heir apparent (*ibid.*, ss. 2—4). The payment of any arrears is provided for, and any surplus is to be paid to the heir apparent's privy purse (*ibid.*, ss. 5, 6). Claims against the heir apparent are to be made by delivering particulars in writing to the proper officer (*semble*, the treasurer) within ten days of the expiration of the quarter in which the debt was incurred, and unless this provision is complied with the claim is barred and all securities therefor are void (*ibid.*, s. 7).

No action lies against the heir apparent in his own name for any debt accruing due after the first quarterly day for the payment of his revenue under his establishment, and no action may be brought upon any bond, bill, note, or security for the same. But for demands made within the time limited as above creditors may sue the treasurer or other principal officer within three months of the delivery of the claim. Judgment, if obtained, constitutes a charge on the funds of the heir apparent in the hands of the treasurer (*ibid.*, ss. 8, 9). In case of negligence or refusal to perform his duties, the principal officer is made liable to the party aggrieved thereby (*ibid.*, s. 10).

(*o*) See p. 370, *post*.

(*p*) See p. 370, *post*.

(*q*) Thus, at common law, the Prince of Wales could, it seems, sue and be sued in the ordinary manner (Y. B. M. 21 Edw. 3, pl. 46; see also Y. B. T. 1 Hen. 5, pl. 2). But see, as to claims against the heir apparent at the present day, note (*n*), *supra*; and as to limitations of actions against the Duke of Cornwall, Vol. VII., Part VII., sect. 4. For an instance of a suit in the ordinary form against the Princess of Wales, see *Princess of Wales* v. *Liverpool* (*Earl*) (1819), 1 Swan. 114, 3 Swan. 567.

(*r*) *The Prince's Case* (1605), 8 Co. Rep. 28 a.

(*s*) The proclamation announcing the accession of Queen Victoria contained a clause saving the rights of any posthumous issue of William IV.

(*t*) But that title was conferred upon both Mary and Elizabeth by Henry VIII. (Steph. Com., 15th ed., Vol. II., p. 534, note (*y*)).

(*u*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2). See p. 350, *ante*.

SECT. 7. The Princess Royal.

Apart from the right of precedence (*x*), the restriction with regard to royal marriages (*a*), and the provision for the maintenance of the King's daughters contained in the Civil List Act, 1901 (*b*), which apply equally to the Princess Royal as to other children of the reigning Sovereign, the Princess Royal occupies, in general, the same legal status as an ordinary subject.

SECT. 8.—*Other Members of the Royal Family.*

Style and precedence.

541. The children of sons of any Sovereign of Great Britain and Ireland are entitled to the style of "Royal Highness," this privilege having been conferred upon them by letters patent (*c*). Precedence has also been conferred upon certain members of the Royal Family by statute (*d*), which provides that no person, except the King's children, shall presume to sit or have place at the side of the cloth of estate in the Parliament chamber; and certain great officers named are to have precedence above all dukes, except only such as shall happen to be the King's son, brother, uncle, nephew (*e*), or brother's or sister's son.

Annuities payable out of the public revenues have been provided for certain members of the Royal Family (*f*), and statutory restrictions are imposed on royal marriages (*g*), but in other respects they are, in general, ordinary subjects.

SECT. 9.—*Royal Marriages.*

Marriages of descendants of George II.

542. No descendant of the body of King George II. (*h*), male or female, under the age of twenty-five years (other than the issue of princesses who have married, or may hereafter marry, into foreign families) is capable of contracting matrimony without the previous consent of the Sovereign signified under the Great Seal and declared in Council; and every marriage or matrimonial contract of any such descendant without such consent first had and obtained is null and void (*i*). If obtained, the Sovereign's consent is directed to be set

(*x*) See par. 541.
(*a*) See par. 542.
(*b*) 1 Edw. 7, c. 4. See Vol. VII., Part VII., sect. 5.
(*c*) See the *London Gazette*, 5th February, 1864.
(*d*) Stat. 31 Hen. 8, c. 10.
(*e*) This term was interpreted by Sir Edward Coke to mean grandson (*nepos*) (see 4 Co. Inst. 362), and was subsequently extended so as to include grandchildren by a resolution of the House of Lords (see Lords' Journal, 24th April, 1760). As to the precedence of subjects generally, see title DIGNITIES.
(*f*) As to the provision for the King's daughters in the Civil List Act, 1901 (1 Edw. 7, c. 4), see Vol. VII., Part VII., sect. 5. As to other annuities to the Royal Family, see Vol. VII., Part VII., sect. 5.
(*g*) See the next section.
(*h*) As to who these persons are, see p. 359, *ante*.
(*i*) Royal Marriages Act, 1772 (12 Geo. 3, c. 11), s. 1. This enactment, made in consequence of the marriage of the then Duke of Cumberland to Mrs. Horton, and of the Duke of Gloucester to Lady Waldegrave (see the Annual Register, 1772, pp. 83, 84), is principally declaratory of the common law, under which the King had the care and approbation of the marriages of his children and grandchildren, and of the heir presumptive (other than the issue of princesses married into foreign families). This was unanimously decided by the judges to be the law in the year 1772, but to what other branches of the Royal Family such care and approbation extended they did not find to have been

out in the licence and register of marriage and to be entered in the books of the Privy Council (*k*).

Persons knowingly and wilfully solemnising or assisting or being present at a marriage, or at the making of any matrimonial contract forbidden by the Act, are, on conviction, liable to incur the penalties provided by the Statutes of Provisors, and Præmunire (*l*). Penalty.

Descendants of the body of George II., being above the age of twenty-five years, may, however, contract a valid marriage, without the consent of the Sovereign, upon giving notice to the Privy Council (which is to be entered in the Council books) at any time after the expiration of twelve months from the giving of such notice, unless in the meanwhile both Houses of Parliament expressly declare their disapprobation of such intended marriage (*m*). Marriage on notice to Privy Council.

Certain statutory provisions relating to marriage generally do not extend to royal marriages (*n*).

Part V.—The Royal Prerogative.

SECT. 1.—*In General.*

SUB-SECT. 1.—*Definition.*

543. The royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of his regal dignity (*o*), and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England (*p*). Definition.

precisely determined (see Lords' Journal, 28th February, 1772, and note (*e*) on p. 370, *ante*). See also note (*o*), p. 364, *ante*). The want of the King's approbation previously to the passing of the Royal Marriages Act, 1772 (12 Geo. 3, c. 11), did not invalidate marriages, but rendered the parties liable to punishment for contempt.

(*k*) Royal Marriages Act, 1772 (12 Geo. 3, c. 11), s. 1. The effect of this enactment is to prohibit contracts for any marriage, and render void any marriage wherever contracted or solemnised in contravention of it (*The Sussex Peerage* (1844), 11 Cl. & Fin. 85, H. L.).

(*l*) Royal Marriages Act, 1772 (12 Geo. 3, c. 11), s. 3. The statutes referred to are 27 Edw. 3, stat. 1, c. 1, and 16 Ric. 2, c. 5. As to the penalty of a *præmunire*, see note (*e*), p. 323, *ante*.

(*m*) Royal Marriages Act, 1772 (12 Geo. 3, c. 11), s. 2.

(*n*) These are the Marriage Act, 1823 (4 Geo. 4, c. 76) (see s. 30); the Marriage Act, 1836 (6 & 7 Will. 4, c. 85) (see s. 45); the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23) (see s. 23). These Acts are not to extend to the marriages of any of the Royal Family. See title HUSBAND AND WIFE.

(*o*) 1 Bl. Com., 14th ed., 239. Literally the term prerogative (*prærogo*) means something demanded before or in preference (*ibid.*). So amongst the Romans the *centuria prærogativa* voted first in the *comitia centuriata*. According to Sir Henry Finch "by the prerogative that is law almost in every case of the King which is law in no case of the subject" (Finch, Discourse on the Law, lib. ii., 85).

(*p*) Com. Dig. tit. Prerog. A. Powers specially conferred upon the Crown cannot be said to form part of the prerogative, although the latter has frequently

SECT. 1. In General.

SUB-SECT 2.—*Nature of the Prerogative.*

Common law limitations on prerogative.

544. The prerogative is thus created and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows (*q*), nor such as are contrary to Magna Carta, or any other statute (*r*), or to the liberties of the subject (*s*).

The courts have jurisdiction, therefore, to inquire into the existence or extent of any alleged prerogative (*t*), it being a maxim of the common law that *Rex non debet esse sub homine, sed sub Deo et lege, quia lex facit regem* (*a*).

Assignment of prerogatives.

545. Though subject to the jurisdiction of the courts, existing prerogatives cannot be affected (*b*) or parted with by the Crown (*c*), except by express statutory authority (*d*). Prerogatives, however, connected with the royal revenues, such as treasure trove, waifs, estrays, and the like, may be granted out in the form of franchises in certain cases (*e*), and some of the prerogatives relating to public government and the right of pardoning offences are usually delegated to the governors of colonies (*f*).

Extent of prerogative.

The prerogative is not confined to the British Islands, but extends to the colonies as fully in all respects as to England (*g*), unless otherwise prescribed by Imperial or colonial enactment.

Classification.

546. The special privileges thus assigned to the Sovereign by the common law fall naturally under three heads (*h*):—(1) Such as

been defined and regulated by statute. See *Case of Convocations* (1610), 12 Co. Rep. 72. See also the statute *Prerogativa Regis*, of uncertain date (17 Edw. 2, stat. 2; stat. 1, Ruff.), the unrepealed portion of which declares the law on certain points as to the Crown's right of presentment to vacant benefices, the custody of the lands etc. of idiots and lunatics, wreck of the sea, royal fish, escheats and forfeitures of felons' goods, the construction of royal grants, and the customs of Gloucester and Kent (*ibid.*, cc. 10—13, 16—18; cc. 8—11, 14—16, Ruff.); and see also Eng. Hist. Rev., VI., p. 367.

(*q*) Com. Dig. tit. Prerog. A.

(*r*) 2 Co. Inst. 36, 54.

(*s*) 1 Bl. Com., 14th ed., 245. See also *Ex parte Barnesley* (1744), 3 Atk. 167, 171.

(*t*) The instances in the books are numerous. For examples of cases where the courts have determined the extent of prerogative rights, see as to monopolies *Darey* v. *Allein*, known as the *Case of Monopolies* (1602), 11 Co. Rep. 84 b. As to exclusive trading licences, *East India Co.* v. *Sandys* (1683—85), 10 State Tr. 371. As to dispensations, *Thomas* v. *Sorrell* (1674), Vaugh. 330; *Godden* v. *Hales* (1686), 11 State Tr. 1166.

(*a*) Bracton, lib. 1, c. 8; 12 Co. Rep. 65; Fleta, 2, c. 5; Chitty, Prerogative of the Crown, 5.

(*b*) *Weymouth Corporation* v. *Nugent* (1865), 6 B. & S. 22.

(*c*) *R.* v. *Eduljee Byramjee* (1846), 5 Moo. P. C. C. 276. A forfeiture can, however, be waived by the Crown (*Middleton* (*Lord*) v. *Power* (1886), 19 L. R. Ir. 1).

(*d*) As to when the Crown is bound by statute, see p. 374, *post*.

(*e*) See p. 421, *post*.

(*f*) See p. 425, *post*.

(*g*) *Re Bateman's Trust* (1873), L. R. 15 Eq. 355. See also title DEPENDENCIES AND COLONIES.

(*h*) By the feudal writers the prerogatives are generally classed as *majora* and *minora regalia*, the first relating to the royal pre-eminence and authority, the latter to the royal revenues. See 1 Bl. Com., 14th ed., 240, 241.

are concerned with the special qualities of pre-eminence and dignity ascribed to the Sovereign in his kingly and regal capacity. (2) Such as are concerned with the various powers and authorities intrusted to the Sovereign as the supreme executive officer in the State. (3) Such as are concerned with the special privileges enjoyed by the Sovereign in relation to rights of property, which have been allowed to him for the support of the royal dignity and the increase of the royal revenues (*i*).

SUB-SECT. 3.—*Sovereignty and Pre-eminence of the Sovereign.*

Supremacy of the Sovereign.

547. Apart from legislative authority, which is vested in Parliament subject to certain concurrent rights of the Crown (*k*), the law of the constitution clothes the person of the Sovereign with supreme sovereignty and pre-eminence (*l*). He is declared by many statutes to be the only supreme head of the realm in matters both spiritual and ecclesiastical, and inferior to no man, dependent on no man, and accountable in his proper person to none, save only to God, either within or without the realm (*m*).

He is, however, bound by the terms of the coronation oath, and the maxims of the common law, to observe and obey the law (*n*).

Sovereign's person inviolable.

548. The person of the Sovereign is inviolable, since it is declared by statute to be the undoubted and fundamental law of the kingdom that neither the Peers of this realm nor the Commons, nor both together, either in Parliament or out of Parliament, nor the people collectively or representatively, nor any other persons whatsoever, ever had, have, or ought to have any coercive power over the persons of the Kings of this realm (*o*).

So also the person of the Sovereign is immune from all suits and actions at law, either civil or criminal (*p*).

Nor is there any power or authority within his dominions

(*i*) The first two of these heads are treated of generally in this sub-section, whilst details of those falling under the third head will be found in the following sections and sub-sections.

(*k*) As to the legislative powers of Parliament, see p. 317, *ante*. As to the legislative powers of the Crown with regard to the colonies, see p. 421, *post*. As to the prerogatives of the Crown in relation to Parliament and to legislation, see p. 388, *post*, and title PARLIAMENT.

(*l*) 1 Bl. Com., 14th ed., 241.

(*m*) See the statutes 24 Hen. 8, c. 12; 25 Hen. 8, cc. 19, 21; 28 Hen. 8, c. 16; 31 Hen. 8, c. 10, s. 2; 32 Hen. 8, c. 20; 1 Eliz. c. 1. See also 26 Hen. 8, c. 1, repealed 1 & 2 Phil. & Mar. c. 8, s. 4, repeal confirmed by 1 Eliz. c. 1. As to the general immunity of the Sovereign in person from actions civil and criminal, and the remedies of the subject as against the Crown, see p. 408, *post*, and titles ACTION, Vol. I., at p. 17; CROWN PRACTICE.

(*n*) As to the coronation oath, see p. 338, *ante*. As to the common law, see Bracton, lib. 1, c. 8, "*Omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo . . . Ipse autem rex non debet esse sub homine, sed sub Deo, et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem, non est enim rex, ubi dominatur voluntas et non lex.*" See also 1 Bl. Com., 14th ed., 241, 242.

(*o*) Stat. 12 Car. 2, c. 30. See also 1 Bl. Com., 14th ed., 241, 242.

(*p*) See p. 374, *post*, and titles ACTION, Vol. I., at p. 17; CROWN PRACTICE.

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capable of binding the Sovereign, save only the Sovereign himself in Parliament, and then only by express mention or clear implication (*q*).

The Sovereign can do no wrong.

549. The law also clothes the person of the Sovereign with absolute perfection (*r*); hence it is a maxim of the common law that "the King can do no wrong" (*s*), and, except by petition of right or traverse of office (*t*), and the cases in which actions relating to Crown private estates are provided for by statute (*u*), no remedy lies against the Sovereign in person either in civil or criminal matters, since the law supplies no remedy where there is no right (*a*). For the prerogative is created for the benefit of the people and cannot be exerted to their prejudice (*b*), and the law will presume no injury where it has provided no remedy (*c*).

The Sovereign is regarded in law as being incapable of thinking wrong, or meaning to do an improper act (*d*). Hence, when royal grants are void as being against law, or invalid for some latent or other defect, the law holds them void on the ground that the Sovereign is "deceived in his grant," rather than that his personal majesty should be lessened by the imputation of intentional wrong (*e*).

In pursuance of the same principle of perfection, no laches or negligence can be attributed to the Sovereign at common law, and no delay will bar his right, the maxim of law being that "time does not run against the king" (*Nullum tempus occurrit regi*) (*f*). In certain cases, however, the Crown is limited by

(*q*) Statutes do not bind the Crown unless expressly or by clear implication (see title STATUTES); and bye-laws made under statutory authority do not bind the Crown unless the authority so to bind it is conferred expressly or by necessary implication (*Gorton Local Board* v. *Prison Commissioners* (1887), reported [1904] 2 K. B. 165, n.; *Cooper* v. *Hawkins*, [1904] 2 K. B. 164). It was enacted by the statute *Revocatio Novarum Ordinationum*, 1322 (15 Edw. 2; 16 Edw. 2, Ruff.), passed for the repeal of the Ordinances (5 Edw. 2; see Statutes of the Realm, 157—168) made under the King's commission (3 Edw. 2) by certain lords and prelates, called the "Ordainers," that "for ever hereafter all manner of ordinances or provisions, made by subjects, by any power or authority whatsoever, concerning the royal power of the King or against the estate of the Crown shall be void and of no avail or force whatever; but matters to be established for the estate of the King or of the realm shall be treated, accorded, and established in Parliaments by the King, and by the assent of the prelates, earls, and barons, and the commonalty of the realm." This statute is still in force. As to the Convention Parliaments on the restoration of Charles II. and the abdication of James II., see p. 389, *post*, and note (*n*), p. 321, *ante*. As to the ordinances enacted by the Long Parliament between 1640 and 1660, which lacked the royal assent, see p. 389, *post*.

(*r*) 1 Bl. Com., 14th ed., 245.

(*s*) *Ibid.*

(*t*) See p. 413, *post*, and title CROWN PRACTICE.

(*u*) See p. 413, *post*.

(*a*) Bac. Abr. Actions, B.

(*b*) *Nichols* v. *Nichols* (1676), Plowd. 477, 487.

(*c*) 1 Bl. Com., 14th ed., 245, note (2).

(*d*) *Ibid.*, 246.

(*e*) As to when grants are void for deceit, see p. 482, *post*.

(*f*) Bac. Abr. tit. Prerog. E, 6; Com. Dig. tit. Prerog. D, 86; Co. Litt. 90 b; *Willion* v. *Berkley* (1561), Plowd. 223, 243; *Hales* v. *Petit* (1562), Plowd. 253, at p. 261.

statute as to the time within which proceedings may be commenced (*g*).

As another result of this principle the Sovereign is regarded legally as immortal, the maxim of law being that "the King never dies" (*h*). The death of the Sovereign in his natural body is therefore termed legally his *demise*, meaning the transfer of the kingdom (*demissio*) to his successor (*i*).

The Sovereign never dies.

SUB-SECT. 4.—*Prerogatives of Power and Authority.*

550. With regard to the royal power and authority, the Sovereign is the supreme executive officer in the State; he is the head of the Church, the Law, the Navy, and the Army, and the source of all titles of honour, distinctions, and dignities; the conduct of foreign affairs, and declarations of war and peace, are intrusted solely to him and his ministers, together with the execution and administration of laws.

The Sovereign as supreme head of the State.

The Sovereign is also regarded by the law as *parens patriæ*, and as such intrusted with the care of charities, infants, idiots, lunatics, and insane people (*k*).

Parens patriæ.

SUB-SECT. 5.—*By whom Exercisable.*

551. The occupancy of the Crown being continuous in the eyes of the law (*l*), on the death of the reigning Sovereign the right to exercise the prerogative vests immediately in his successor (*m*), the right being equal in all respects in the case of a female as in the case of a male (*n*). But acts done by the King for the time being, or *de facto* King, whether he be the rightful heir according to the rules of hereditary descent or not, are good and valid in law, whilst the exercise of the prerogative by the rightful heir out of possession is void and of no legal effect (*o*).

By whom the prerogative is exercisable.

552. In consequence of the legal doctrine of perfection (*p*), the Sovereign in his regal or political capacity can never be a minor or under age, and all acts done by him in the exercise of the prerogative are valid in law, even though he has not attained the age of twenty-one years (*q*), and during his non-age he has no legal

The Sovereign has no minority.

(*g*) As to the limitation of actions by and against the Crown, see p. 410, *post*, and title LIMITATION OF ACTIONS.

(*h*) 1 Bl. Com., 14th ed., 249.

(*i*) *Hill* v. *Grange* (1556), Plowd. 164, 177: *Willion* v. *Berkley* (1561), Plowd. 223, 243; *Wroth's* (*Sir Thomas*) *Case* (1572), Plowd. 452, 457.

(*k*) As to these prerogatives, see the following sections.

(*l*) See p. 325, *ante*.

(*m*) 1 Bl. Com., 14th ed., 249; and see p. 325, *ante*.

(*n*) 1 Mar. sess. 3, c. 1. See also p. 320, *ante*.

(*o*) Thus, all judicial acts done by Henry VI. whilst in possession of the Crown, and all pardons and charters of denization granted by him, were good. But a pardon granted by Edward IV. before he obtained possession of the Throne was void (3 Co. Inst. 7; Bac. Abr. Prerog. A). As to the duty of allegiance to the *de facto* King, see p. 339, *ante*. As to treason to the *de facto* King, see p. 363, *ante*.

(*p*) See p. 374, *ante*.

(*q*) Co. Litt. 43 a, b; 2 Co. Inst. proëm. 3; 1 Bl. Com., 14th ed., 248. By stat. 28 Hen. 8, c. 17, power was given to future Sovereigns to revoke all

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guardians (*r*). So also the incapacity of the Sovereign, arising through insanity, sickness, or the like, has no possibility in legal contemplation, and no provision is made by the law for the exercise of the prerogative by guardians or regents on such occasions.

Regency during incapacity.

553. It has been usual, however, where the Sovereign is likely to succeed to the Throne whilst of tender years, to make special parliamentary provision (*a*) for the exercise of the regal authority through a regent or protector, or a council of regency, or both (*b*), until the Sovereign arrives at years of discretion (*b*), the duties of the regent and council being defined by the Acts. No person professing the Roman Catholic religion can hold or exercise the office of guardian and justice or of regent of the United Kingdom under whatever name, style, or title such office may be constituted (*c*).

In the case of the Sovereign's incapacity through insanity, the regency has been exercised, on one occasion, by the heir apparent under statutory authority (*d*).

Vacancy of the Throne.

554. No such thing as an interregnum being recognised or contemplated by the substantive law of the constitution, on a vacancy of the Throne occurring for want of heirs, abdication, or the like (*e*), no provision is made at common law for the exercise of the prerogative. In such cases Parliament has made regulations to meet the particular emergency, even to the extent of appointing a successor and limiting the succession afresh (*f*). But enactments made by a Parliament convened in an irregular manner without the royal writ, or to which the royal assent has not

enactments made by Parliament whilst they should be under the age of twenty-four. This enactment was repealed temporarily by stat. 1 Edw. 6, c. 11, and both these statutes were determined and annulled by stat. 24 Geo. 2, c. 24, s. 23.

(*r*) 1 Bl. Com., 14th ed., 248.

(*a*) Though there are no rules of law governing the matter, it is safest to obtain parliamentary authority for the exercise of a guardianship or regency (4 Co. Inst. 58).

(*b*) There are numerous instances of the exercise of the prerogative through a protectorship or regency (see Hume, Hist. Eng., ed. 1802; Taswell-Langmead, Eng. Const. Hist., 6th ed.; Anson, Law and Custom of the Constitution, 3rd ed.; Stubbs, Const. Hist., ed. 1875; also see 25 Hen. 8, c. 22, s. 8; 28 Hen. 8, c. 7; 24 Geo. 2, c. 24; 5 Geo. 3, c. 27; 1 Will. 4, c. 2; and 3 & 4 Vict. c. 52).

(*c*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 12.

(*d*) In 1788 a regency bill was introduced owing to the insanity of George III. In a debate in the House of Lords the then Duke of York, on behalf of his brother the then Prince of Wales, disclaimed any right to assume the regency without the consent of Parliament. The bill was subsequently dropped owing to the King's recovery (see Parl. Hist., 1788-9, Vol. XXVII., p. 678). The King having again become insane, the Prince of Wales was appointed regent by statute (1811) 51 Geo. 3, c. 1, and exercised the regency until the death of the King in 1820 (May, Const. Hist., ed. 1861, Vol. I., p. 183).

(*e*) The refusal of the King to perform the regal functions, by withdrawing himself out of the realm or otherwise, is abhorrent to the spirit of the constitution, and would probably be regarded by Parliament as a breach of the contract between the Crown and people, as in the case of James II. (see 1 Bl. Com., 14th ed., 244—5).

(*f*) As to the limitation of the descent of the Crown by the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), see p. 321, *ante*.

been affixed, are not legally recognised as statutes (*g*). Such enactments may, however, be ratified, where that course appears desirable, by a Parliament summoned in the usual manner after the vacant Throne has been filled (*h*), and in such a case are recognised legally as statutes.

Lord Justices.

555. When a vacancy of the Throne has appeared likely to occur through the successor being abroad, statutory provision has been made beforehand for the appointment of Lords Justices, whose powers and duties were carefully defined, to exercise the prerogatives of government during the absence of the successor (*i*). In the case of the King's voluntary absence abroad, the appointment of Lords Justices by commission under the Great Seal has in some instances been resorted to (*k*).

SUB-SECT. 6.—*Statutory Limitations of the Prerogative.*

Statutory limitations.

556. The extent of the prerogative being necessarily somewhat vague at common law, it has been found necessary at various times to define its limits more accurately by statute. The principal provisions, from a constitutional standpoint, are to be found in four great statutes or charters by which the rights and liberties of the subject are preserved and acts of tyranny by the Crown or its ministers restrained (*l*).

By Magna Carta.

557. The Crown or its ministers may not punish, imprison, or coerce the subject in an arbitrary manner. No freeman may be

(*g*) The enactments made by the Long Parliament without the royal assent are generally termed ordinances and do not appear upon the statute books. The reign of Charles II. is dated legally from 1649, in which year Charles I. was executed, though the former did not commence to reign until 1660.

(*h*) See stat. 2 Will. & Mar., c. 1 ; sess. 1, c. 1, Ruff., by which the Acts of the previous Parliament were legalised. As to the ratification of the Acts of the Convention Parliaments of 1660 and 1688, see note (*u*), p. 389, *post*, and note (*n*), p. 321, *ante*, respectively.

(*i*) For examples of such enactments see the Succession to the Crown Act, 1707 (6 Ann. c. 41 ; c. 7, Ruff.); the Lords Justices Act, 1837 (7 Will. 4 & 1 Vict. c. 72).

(*k*) In the year 1788, when George III. desired to go abroad, it was proposed to appoint Lords Justices for exercising the regal functions, and a committee of the House of Commons was formed to inquire into the precedents for such a course. For the various precedents, and in particular the commission used by George I. in 1719, see Commons' Journal, 12th December, 1788 (Vol. XLIV., p. 40).

(*l*) These are Magna Carta, 1215 (see the Confirmation of the Charters, and reissue, 1297 (25 Edw. 1), printed in Statutes of the Realm) ; the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), confirmed by stat. 2 Will. & Mar. c. 1 ; sess. 1, Ruff.; and the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2). Magna Carta being within the period of legal memory (fixed at the commencement of the reign of Richard I.; see note (*k*), p. 485, *post*), is still in force and binding upon the Crown, so far as its provisions are not obsolete or repealed. It was confirmed, and sometimes extended, but more frequently curtailed, by Henry III., and by numerous subsequent charters (Coke reckons thirty-two) down to the reign of Henry IV., and in particular by the confirmation and reissue of 1297 (25 Edw. 1, stat. 1, Ruff.), by which it was directed to be observed as the common law of the realm and all judgments contrary to it were declared void. This statute is still in force except cc. 3, 4. The Petition of Right

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taken or imprisoned, or disseised of his freehold or liberties or free customs, or be outlawed or exiled, or in any other wise molested (*destruatur*, lit. "destroyed"). Nor may he be judged (*nec super eum ibimus*), or condemned (*nec super eum mittimus*), except by the lawful judgment of his peers, or by the law of the land. Nor may justice or right be sold, denied, or deferred to any (*m*).

Freedom of justice.

558. The Crown or its ministers may not interfere with the ordinary course of justice. It is enacted that it shall not be commanded by the great or little seals to disturb or delay common right, and that though such commandments do come, the justices are not therefore to leave to do right in any point (*n*); and that jurors ought to be duly impanelled and returned (*o*), and excessive bail or fines ought not to be required or imposed, nor cruel and unusual punishments inflicted (*p*). Moreover, all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void (*q*). Nor may the Crown bring pressure to bear upon the judiciary through fear of dismissal, since it is enacted that the judges are to hold office during good behaviour, subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament (*r*).

was drawn up by the Commons in 1627 (3 Car. 1), and recited in particular Magna Carta, the statute *de Tallagio non Concedendo*, 1297 (25 Edw. 1; 34 Edw. 1, stat. 4, c. 1, Ruff.); a statute 25 Edw. 3, stat. 1, c. 6, against forced loans; the statutes 1 Edw. 3, stat. 2, c. 6; 11 Ric. 2, c. 9; 1 Ric. 3, c. 2, relating to benevolences; and the Charter of Liberties (9 Hen. 3, stat. 1, c. 29). To the petition itself the King appended the answer, "*Soit droit fait come est desiré.*" As to the manner in which the Bill of Rights was enacted, see note (*n*), p. 321, *ante*. These statutes must not be regarded as curtailments of existing prerogatives, but as declarations of the fundamental laws of England. See 2 Co. Inst. proëm. p. 3; 1 Bl. Com., 14th ed., 128.

(*m*) Magna Carta, 1215, cc. 39, 40. See the confirmation and reissue, 1297 (25 Edw. 1, c. 29). See also the Petition of Right, 1627 (3 Car. 1, c. 1), s. 10.

(*n*) Statute of Northampton, 1328 (2 Edw. 3, c. 8).

(*o*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2). Down to the year 1670 juries were frequently punished for verdicts proved wrong on appeal or contrary to the direction of the judge. The Court of Star Chamber, before its abolition in 1640 (see note (*c*), p. 379, *post*), frequently summoned juries before it and inflicted fines and imprisonment upon them, as in *Sir Nicholas Throckmorton's Case* (1554), 1 State Tr. 869, when eight members of a jury were heavily fined and imprisoned for having acquitted Sir Nicholas Throckmorton of high treason. The immunity of jurors in actions brought by persons injured by a wrongful verdict was established in *Floyd* v. *Barker* (1608), 12 Co. Rep. 23. The immunity of jurors from punishment for wrongful verdicts was established in *Bushell's Case* (1670), 6 State Tr. 999, where on writ of *habeas corpus* the return was made that the prisoners were committed for returning a verdict "against the plain and manifest weight of evidence, and against the direction of the court on a point of law." Held by VAUGHAN, C.J., that a jury could not be punished in a criminal case for such a finding. Generally as to juries, see title JURIES.

(*p*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2). See also the Statute of Westminster the Second, 1285 (13 Edw. 1, c. 37), by which no distresses are to be taken except by bailiffs sworn and known.

(*q*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2). As to the Crown's right to fines and forfeitures generally, see p. 489, *post*.

(*r*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5, re-enacting a similar

559. The Crown may not suspend laws or the execution of laws without the consent of Parliament (*s*); nor may it dispense with laws, or the execution of laws (*t*); and dispensations by *non obstante* of or to any statute or part thereof are void and of no effect, except in such cases as are allowed by statute (*a*).

Laws may not be suspended.

Nor may the Crown or its ministers erect courts where persons may be tried in an arbitrary manner, since the issue of commissions to try persons according to the law martial, as is used by armies in time of war (*b*), or the issue of commissions to erect illegal courts (*c*), are declared to be against law.

Nor irregular courts constituted.

560. The Crown or its ministers may not impose direct or indirect taxes without parliamentary sanction. It is enacted that no man shall be compelled to make or yield any gift, loan, benevolence (*d*), or tax without common consent by Act of

Taxation.

provision in the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3, par. 7, now repealed. As to the qualification and appointment etc. of judges generally, see title COURTS.

(*s*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), s. 1.

(*t*) *Ibid.* The words of this provision extend only to the dispensing power "as it hath been assumed and exercised of late," but there can be no doubt that all dispensations would be deemed unconstitutional and illegal at the present day. See *Eton College* v. *Winchester* (*Bishop*) (1774), 2 Wm. Bl. 936.

(*a*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), s. 12. This provision does not extend to common law offences, but the King was always held unable to license offences *mala per se;* it was otherwise as to *mala prohibita.* See *Thomas* v. *Sorrel* (1674), Vaugh. 330, 332; *Langdale's Case* (1608), 12 Co. Rep. 58, 61; *Anon.* (1609), 12 Co. Rep. 30. A decision (*temp.* James II.) that it was the King's "inseparable prerogative to dispense with penal laws in particular cases and upon particular necessary reasons of which the King himself is sole judge" (*Godden* v. *Hales* (1686), 11 State Tr. 1166) was obtained by means of a packed judiciary. Compare, however, Hallam's Const. Hist., 3rd ed., Vol. III., p. 86, where it is said that it was by no means evident that the decision of HERBERT, C.J., which had the approbation of eleven out of twelve judges, was not good law). In the same reign, in the *Seven Bishops' Case* ((1688), 12 State Tr. 183), the bishops were charged with seditious libel for having petitioned the King against a declaration of indulgence, "founded on such a dispensing power as has often been declared illegal in Parliament." Two judges were for conviction, and two against, but the jury, after twelve hours' discussion, acquitted them.

(*b*) Petition of Right, 1627 (3 Car. 1).

(*c*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2). Particular reference is made by this section to the Court of Commissioners for Ecclesiastical Causes, which James II. endeavoured to set up. The section proceeds, "and all other commissions and courts of like nature are illegal and pernicious." See also the statute 16 Car. 1, c. 10, ss. 2, 3, by which it was enacted that henceforth no court was to be created with similar jurisdiction to that exercised by the Court of Star Chamber, which was thereby abolished, and that neither the Crown nor the Privy Council have or ought to have any jurisdiction by English bill, petition, articles, libel, or any other arbitrary way to draw into question, determine, or dispose of, the lands, goods etc., of any subject. Heavy penalties and treble damages are also imposed by the Act upon any Lord Chancellor or Keeper of the Great Seal, Lord Treasurer, Keeper of the King's Privy Seal, President of the Council, bishop etc., for offences against the Act (*ibid.*, ss. 6, 7).

(*d*) Forced loans or benevolences were first levied by Richard II. (Hume's History of England, Vol. III., p. 60), and declared illegal by statute in 1483 (1 Ric. 3, c. 2), but reintroduced by Henry VII. in 1495 (see 11 Hen. 7, c. 10) Persons who objected to pay were often fined and imprisoned by the Star Chamber (see

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Parliament (*e*); and that money may not be levied to or for the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted (*f*). In fact no exercise of the prerogative which involves the imposition of a charge upon the people can take full effect without parliamentary sanction (*g*).

Standing army.

561. The Crown or its ministers are restrained from the exercise of despotic power imposed upon the people by fear of military force, the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, being

Gardiner's History of England, Vol. II., p. 269). On the exaction of a forced loan by Charles I. in 1626 many persons were committed for refusing to pay, and in *Sir Thomas Darnel's Case* (1627), 3 State Tr. 1, it was held by HYDE, C.J., on writ of *habeas corpus*, that the King's Bench could not inquire into the grounds of the commitment, the warrant having been made "by special command of the King." The commands of the King can no longer be pleaded in justification of illegal acts (see pp. 382, 415, *post*).

(*e*) Petition of Right, 1627 (3 Car. 1), s. 10. The corresponding provision in Magna Carta, c. 12, was to the effect that no scutage or aid other than the three customary feudal aids (as to these, see title REAL PROPERTY AND CHATTELS REAL) should be imposed without the consent of the *commune concilium*. After the Restoration in 1660 these feudal revenues, together with those derived from the Court of Wards and Liveries, and the right of purveyance, ceased with the abolition of the feudal tenures, which were turned into free and common socage by the statute 12 Car. 2, c. 24, ss. 1, 2.

Direct taxes were frequently imposed under the Tudors and Stuarts by proclamation, letters patent, or writs under the Great Seal. The subservience of the judiciary aided the Crown in these illegal exactions, and is well illustrated in *Hampden's Case* (known as the *Case of Ship Money*) (1637), 3 State Tr. 826; in that case it was held by seven judges out of twelve that writs issued by the Crown to the sheriffs in 1636 commanding them to provide the ships, men, victuals etc., mentioned in the writ, and to assess the amount required for this purpose upon the people, were binding upon the subject. For the first writ so issued by the King, see Rushworth's Historical Collections, ed. 1721, Vol. II., p. 257. The Long Parliament subsequently passed an Act in 1640 declaring the writs imposing ship's money and the proceedings in *Hampden's Case*, *supra*, "contrary to the laws and statutes of the realm, the right of property, the liberty of the subject, and the Petition of Right," and vacated and cancelled the judgment (16 Car. 1, c. 14).

(*f*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), s. 1; stat. 16 Car. 1, c. 8.

(*g*) Thus, a treaty which involves the imposition of a tax needs parliamentary sanction before it can take full effect (p. 441, *post*). Certain statutes of the mediæval period, *e.g.*, 45 Edw. 3, c. 4, and the fact that from 1376 to James I.'s reign parliamentary sanction was got to the levy of tunnage and poundage (Dowell, History of Taxation, pp. 137, 221), made it fairly clear that Parliament had some control over indirect taxation. But, though probably the Crown could not levy indirect taxes without parliamentary sanction, the Crown had, up to the seventeenth century, large and indefinite powers over foreign trade, as part of its prerogative to control foreign affairs. In *Bates' Case* (1610), 2 State Tr., 371, the Crown contended that an imposition was lawful because it was levied in order to regulate trade; and the court upheld this contention. The decision was not at first objected to. Indeed, Hakewill, who argued in favour of parliamentary control in 1610, admits (6 State Tr., at p. 409) that when he heard the judgment he was "much persuaded." But James I. showed that he meant to use the decision to levy indirect taxes by the prerogative. Hence the debate in Parliament on impositions in 1610, and the refusal in 1625 to grant tunnage and poundage to Charles I. for more than a year. In the end the law was settled by the statutes cited in note (*f*), *supra*, in the sense stated in the text.

against law (*h*). Nor may soldiers and marines be billeted upon private persons (*i*), unless under statutory authority (*j*).

Parliament.

562. The Crown or its ministers are restrained from ruling without a Parliament, since it is enacted that for redress of all grievances and for the amending, strengthening, and preserving of laws Parliaments ought to be held frequently (*k*).

Election.

563. Nor may the Crown interfere with the election of members of Parliament, which ought to be free (*l*), nor impeach or question the freedom of speech and debates or proceedings in Parliament, which ought not to be impeached or questioned in any court or place out of Parliament (*m*).

Impeachment.

564. The Crown is restrained from shielding its ministers and servants from an inquiry into illegal acts by means of pardons, since it is enacted that no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament (*n*); but a pardon may, however, be granted after sentence (*o*).

Foreign ascendency

565. National interests may not be dominated by foreign influence or the conduct of the executive controlled by foreigners, since no person born outside the United Kingdom or the dominions thereunto belonging (although he be made a denizen), except he be born of British parents or has been naturalised, is capable of becoming a Privy Councillor or a member of either House of Parliament, or of holding any office or place of trust, either civil or military (*p*).

It is also provided that, in case the Crown shall come to any person not being a native of England, this nation shall not be obliged to engage in any war for the defence of any dominions or

(*h*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), s. 1.

(*i*) Petition of Right, 1627 (3 Car. 1), s. 10.

(*j*) As to the billeting of soldiers under statute, see title ROYAL FORCES.

(*k*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), s. 1 (13). As to other statutory provisions securing, and the constitutional necessity for, the regular summons of Parliament, see p. 383, *post*, and title PARLIAMENT.

(*l*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), s. 1. See also the Statute of Westminster the First, 1275 (3 Edw. 1, c. 5), which prohibits the subject from interfering with elections by force of arms, malice, or menacing; and title ELECTIONS.

(*m*) Bill of Rights, *supra*. As to the privileges of Parliament generally, see title PARLIAMENT.

(*n*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3 (8).

(*o*) Thus, three of the rebel lords impeached and attainted in 1715 were subsequently pardoned (see p. 404, *post*).

(*p*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3 (5). By the Naturalization Act, 1870 (33 & 34 Vict. c. 14), nothing in that Act is to affect the grant of letters of denization. As to what constitutes a British subject, see p. 340, *ante*; and as to statutory British subjects under the Naturalization Act, 1870 (33 & 34 Vict. c. 14), see title ALIENS, Vol. I., at pp. 308, 313. The part of the section as to naturalised aliens and the incapacity of aliens (naturalised or otherwise) to take grants of land from the Crown have been impliedly repealed by the Naturalization Act, 1870 (33 & 34 Vict. c. 14). See also note (*i*), p. 342, *ante*.

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territories which do not belong to the Crown of England, without the consent of Parliament (*q*).

SUB-SECT. 7.—*Constitutional Checks upon Improper Exercise.*

Restraints upon improper exercise of prerogative.

566. Though, in consequence of the legal attribute of perfection (*r*), the King can do no wrong, and therefore no remedy is provided by the law as against the Sovereign in person, or his ministers in their official capacity, for wrongful acts (*s*), certain restraints are imposed by the law and custom of the constitution upon the arbitrary and improper exercise of the prerogative.

Subjection to the law.

567. First, since all means of arbitrary and despotic coercion on the part of the Crown and its ministers have been removed by the law of the constitution (*t*), where the subject refuses to comply with what appear to be unjust or illegal demands made by the Crown, the ministers and servants of the latter, in order to enforce obedience, must have recourse to the ordinary tribunals of justice. Claims made by the Crown cannot be supported by mere pretence of prerogative, since the courts have power to determine the extent and the legality or otherwise of any alleged prerogative (*a*); nor may illegal acts be rendered justifiable by the plea of the King's commands (*b*), or State necessity (*c*). The Crown is bound to observe the law both by statute and by the terms of the coronation oath, which embodies the contract between the Crown and people upon which the title to the Crown originally depended, and still in large measure depends (*d*). Upon any doubtful point of prerogative the Crown and its ministers must, therefore, bow to the decision of the legal tribunals.

Ministerial responsibility.

568. Secondly, under the conventional law of the constitution the Crown acts only upon the advice of its constitutional advisers (*e*), and through the recognised executive departments and officers (*f*). Under the doctrine of ministerial responsibility (*g*), the ministers of the Crown are responsible to Parliament for the advice given by them, and may be punished for improper advice by loss of office or by censure (*h*).

(*q*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3 (2).

(*r*) See p. 374, *ante*.

(*s*) As to legal proceedings against the Crown generally, see p. 412, *post*. As to the liability of public officers and authorities to criminal indictments for breach or violation of statutory duties, see *R.* v. *Hall*, [1891] 1 Q. B. 747, 753. As to their liability in an action for damages, see *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64, 69. See also p. 412, *post*, and titles ACTION, Vol. I., p. 1; CROWN PRACTICE; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*t*) See pp. 377 *et seq.*, *ante*.

(*a*) See p. 372, *ante*.

(*b*) *Danby's* (*Earl*) *Case* (1683), 11 State Tr. 599, 627, 629; and see p. 383, *post*.

(*c*) *Entick* v. *Carrington* (1765), 19 State Tr. 1030, 1067. See title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*d*) See p. 338, *ante*.

(*e*) See p. 386, *post*.

(*f*) *Ibid.*

(*g*) As to this doctrine, see p. 386, *post*.

(*h*) See p. 386, *post*.

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Liability of ministers.

569. Thirdly, all ministers and servants of the Crown, and public officers generally, are civilly and criminally liable, in their individual capacity, for tortious or criminal acts (*i*), subject to certain provisions protecting judges and justices of the peace in the execution of their offices (*k*), and, as to public authorities generally, subject to certain statutory conditions limiting the time within which the action is to be brought etc. (*l*); and this liability may be enforced either by means of an impeachment or by ordinary criminal or civil proceedings (*m*).

Petitions.

570. Fourthly, in cases where no illegal act has actually been committed, and consequently no action lies, but where the subject deems himself unduly oppressed by the sentence of a judge or the conduct of an official, the law of the constitution has provided a remedy by petition to the Crown, the exercise of which right cannot be denied, since it is enacted that it is the right of the subject to petition the King, and all commitments and prosecutions for such petitioning are illegal (*n*).

Annual Parliament.

571. Fifthly, the necessity for obtaining supplies, which can only be granted by Parliament (*o*), and without which the government could not be carried on, and the necessity for the continuation of various Acts expiring in each year (*p*), obliges the Crown to summon Parliament annually, and to observe the conventional laws and customs of the constitution relating to the conduct of parliamentary and political affairs (*q*).

SUB-SECT. 8.—*Effect of the Demise of the Crown.*

Demise of the Crown.

572. Although the occupation of the Crown is continuous in legal contemplation (*r*), the demise (*s*) of the Crown had formerly

(*i*) As to the personal liability of servants of the Crown, see *Danby's (Earl) Case* (1683), 11 State Tr. 599; *Entick* v. *Carrington* (1765), 19 State Tr. 1067. In such actions no malice or want of probable cause need be shown (see *Brasyer* v. *Maclean* (1875), L. R. 6 P. C. 398; *Cobbett* v. *Grey* (1850), 4 Exch. 729). See also p. 415, *post*. As to the liability of public officers and authorities, see the cases etc. cited in note (*s*), p. 382, *ante*. See also p. 412, *post*.

(*k*) See p. 416, *post*.

(*l*) See Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*m*) As to the Commons' right of impeachment generally, see title PARLIAMENT.

(*n*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2). The necessity for such a provision was proved by the *Seven Bishops' Case* (1688), 12 State Tr. 183, as to which see note (*a*), p. 379, *ante*. As to the statutory provisions against tumultuous petitioning, see note (*a*), p. 358, *ante*. As to petitions for pardon, see p. 405, *post*.

(*o*) See p. 390, *post*. As to the inability of the Crown to impose taxes without the consent of Parliament, see p. 379, *ante*.

(*p*) *E.g.*, the annual Army Act, as to which see p. 419, *post*. The Acts which expire in each year are kept in force by means of the annual Expiring Laws Continuance Acts. For the Acts which must be so continued, see the Expiring Laws Continuance Act, 1908 (8 Edw. 7, c. 18), Schedule.

(*q*) As to conventions generally, see p. 389, *post*. As to the conventional law relating to the Cabinet system and ministerial responsibility, see Vol. VII., Part VI., sect. 2.

(*r*) See p. 325, *ante*.

(*s*) As to the legal meaning of the term "demise," see p. 375, *ante*.

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the effect of dissolving Parliament, vacating offices under the Crown, discontinuing legal processes and indictments, and causing other inconveniences. These have been remedied by a variety of statutes, and now on the demise of the Crown the duration of an existing Parliament is no longer affected (*t*), whilst if the demise occurs subsequent to the dissolution or expiration of a Parliament and before the day appointed by the writs of summons for assembling a new Parliament, the preceding Parliament is revived for six months, unless sooner prorogued or dissolved by the successor to the Crown (*u*); and the holding of any office under the Crown, whether within or without His Majesty's dominions, is not affected, nor is any fresh appointment thereto rendered necessary, by the demise of the Crown (*a*).

Privy Council.

573. The Privy Council is not determined or dissolved by the demise of the Crown, but continues and acts as such for the space of six months after such demise, unless sooner determined by the next successor to whom the Crown is limited and appointed to descend (*b*).

The seals.

574. The great seal, privy seal (the use of which is now abolished (*c*)), privy signet, and all other public seals in being at the time of the demise of the Crown, are to continue and be made use of as the respective seals of the successor, until the latter gives orders to the contrary (*d*).

Officers of the Duchies etc.

575. No office, place, or employment, civil or military, of the nomination, constitution, or appointment of the Prince of Wales, Duke of Cornwall, or Earl of Chester, for the time being, within the Principality of Wales, Duchy of Cornwall, or County Palatine of Chester, becomes void by the demise of the Crown, or by reason of the determination of any grant of the principality or earldom, or by reason of any descent of the duchy, or of the custody of the duchy coming to the Crown (*e*). The above offices continue for the space of six months from the time of such demise, determination, grant descent etc., unless the occupants are sooner removed or discharged by the Sovereign, or by the Prince of Wales, Duke of Cornwall, or Earl of Chester for the time being respectively (*f*).

(*t*) Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 51. If separated by adjournment or prorogation, such Parliament must immediately after the demise of the Crown meet, convene, and sit. See Succession to the Crown Act, 1707 (6 Ann. c. 41, s. 5; c. 7, Ruff.). See also title PARLIAMENT.

(*u*) Meeting of Parliament Act, 1797 (37 Geo. 3, c. 127), s. 3; and see title PARLIAMENT.

(*a*) Demise of the Crown Act, 1901 (1 Edw. 7, c. 5), s. 1 (1).

(*b*) Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.), s. 8. The office of Privy Councillor would also, it seems, be covered by the general enactment as to public offices contained in the Demise of the Crown Act, 1901 (1 Edw. 7, c. 5), s. 1 (1), as to which see the text above.

(*c*) See Vol. VII., Part VI., sect. 1.

(*d*) Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.), s. 9.

(*e*) As to the vesting of the Duchy of Cornwall in the Crown in certain cases, see Vol. VII., Part VII., sect. 4.

(*f*) Demise of the Crown Act, 1727 (1 Geo. 2, stat. 1, c. 5), s. 7, as partially repealed by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 39, Sched. III.

Sheriffs and sheriffs' officers in the Duchy of Cornwall continue in office for the remainder of their terms upon any demise of the Crown or of the Duchy of Cornwall, unless sooner removed or superseded (*g*).

Crown servants.

576. Where on the demise of the Crown any person is continued in the enjoyment of, or reappointed (*h*) to, any office, employment, pension, rank, or precedence, granted during the pleasure of the Crown by any letters patent, commission, warrant, or other commission, such person is exempted from the payment of any fee or stamp duty in respect of the reappointment or regrant either to the Crown or to any other person whomsoever (*i*), except with regard to the remuneration to be paid by the Treasury, and which is to be paid to the various persons whose right and duty it is, or may be by virtue of their respective offices, to prepare, make out, settle, and attend to the passing of the usual commissions, letters patent, warrants, or other instruments, upon such reappointment or regrant (*k*).

Judicial commissions.

577. Commissions of assize, oyer and terminer, general gaol delivery, of association, or of the peace, and writs of admittance, *si non omnes*, and of assistance, are not determined by the demise of the Crown, but continue in full force for the space of six months thereafter, unless sooner superseded and determined by the Crown (*l*).

Commissions for the taking of affidavits to be made use of and read in any court, or for taking recognisances of bail, remain and continue in force during the pleasure of any successor of the Sovereign by whom the same may have been granted, until revoked or otherwise avoided (*m*).

Legal process.

578. Writs, pleas, or process, or any other proceeding upon any indictment or information for any offence or misdemeanour, and writs, processes, or proceedings for any debt or account due to be made to the Crown concerning any lands, tenements, or other revenue belonging to the Crown, depending at the time of the demise of the

(*g*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 3 (3). This provision applies also to sheriffs generally, but is now covered to that extent, it seems, by the Demise of the Crown Act, 1901 (1 Edw. 7, c. 5) (see p. 384, *ante*). See title SHERIFFS AND BAILIFFS.

(*h*) Reappointment to offices under the Crown is now, in general, rendered unnecessary by the provisions of the Demise of the Crown Act, 1901 (1 Edw. 7, c. 5), s. 1 (1); see p. 384, *ante*.

(*i*) Demise of the Crown Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 43), s. 1.

(*k*) *Ibid.*, s. 2. The Treasury is directed in all such cases to fix and determine a proper and adequate remuneration which is to be paid by the persons who would have been chargeable if the Act had not passed.

(*l*) 1 Ann. c. 2, stat. 1 (c. 8, Ruff.), s. 5. This clause is annexed to the original Act in a separate schedule; see the Statutes Revised, Vol. I., p. 770, note 2. This provision extends to Ireland, Jersey and Guernsey, and all His Majesty's possessions in America and elsewhere (*ibid.*, s. 6, Schedule in the original Act). The matter would now be covered, it seems, by the general enactment as to offices under the Crown (see p. 384, *ante*).

(*m*) Demise of the Crown Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 43), s. 4.

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Crown, continue and remain in full force and virtue, to be proceeded upon notwithstanding the demise of the Sovereign (*n*).

All pleas and informations in the King's Bench are to stand and be good in law upon the demise of the Sovereign, and no defendant need plead again to the same unless he so desires, in which case he must apply to the court for that purpose within five months from the time of the demise (*o*). All writs and proceedings generally in the various courts remain in full force and effect upon the demise of the Crown, and may be proceeded upon in their ordinary course (*p*).

SECT. 2.—*The Crown in Relation to the Executive.*

Executive acts.

579. By virtue of the prerogative the Sovereign is the supreme executive authority in the State, and all executive acts are done in his name (*q*). Executive acts are concerned either with the administration of parliamentary enactments and the rules and regulations made thereunder, or with the exercise of the discretionary authority which is placed in the hands of the Sovereign by virtue of the common law without any express parliamentary sanction or supervision.

In neither of these branches of the executive may the King act in person or upon his own arbitrary impulse. In the former he must act through his constitutional officers and departments of state (*r*), whilst in the latter he must act through the medium of the customary officers and departments upon the advice of his constitutional ministers, such advice being given individually by the heads of the various ministerial or political departments (*r*) in minor matters, or collectively through the Cabinet (*s*) in more important matters, such as the declaration of war or peace or the granting of legislative institutions to Crown colonies.

There is no act of the executive for which some officer or minister of the Crown is not responsible, and for which he may not be made liable either to punishment upon an impeachment or in a court of

(*n*) 1 Ann. c. 2 (c. 8, Ruff.), s. 4. As to abatement of petition of right on the demise of the Crown, see title CROWN PRACTICE and Robertson Civil Proceedings by and against the Crown, pp. 369, 370.

(*o*) 4 Will. & Mar. c. 18, s. 6.

(*p*) 1 Ann. c. 2 (c. 8, Ruff.), s. 5, Schedule in the original Act. The proceedings etc. specifically mentioned in the section are "original writs, writs of *nisi prius*, commissions, process, or proceedings whatsoever, in or issuing out of any court of equity, or any process or proceeding upon any office or inquisition, or any writ of *certiorari* or *habeas corpus* in any matter or cause either criminal or civil, or any writ of attachment or process for contempt, or any commission of delegacy or review for any matters ecclesiastical, testamentary, or maritime, or any process thereupon." These are not to be determined, abated, or discontinued by the demise of the Crown.

(*q*) 1 Bl. Com., 14th ed., 249, 250.

(*r*) As to these, see Vol. VII., Part VI.

(*s*) As to the formation and functions of this body, see *ibid.* As to the advisory functions of the Privy Council, see *ibid.* By custom it is left to individual ministers to decide whether a question is sufficiently important for the Cabinet, but the Prime Minister may make any question he thinks fit a Cabinet matter (see *ibid.*).

law in the case of tortious or criminal acts (*a*), or to censure or loss of office in the case of bad advice given to the Crown in the exercise of its discretionary authority (*b*).

Appointment of public officers.

580. Laws, whether of a temporal, ecclesiastical, or military nature, are called the King's laws, and it is his prerogative to see that they are duly executed (*c*). Moreover, all public officers are appointed by and derive their authority from the King either mediately or immediately (*d*), and he can compel his subjects to serve in such offices as the public good and the nature of the constitution require (*e*), refusal to perform a public duty, when legally called upon to do so, being a punishable offence (*f*). The Sovereign may, however, grant exemption from service though the office is not under his immediate control (*g*).

The Sovereign may also create new offices (*h*); but he cannot create new offices with new fees, nor annex new fees to old offices, for that would constitute a tax (*i*); nor may he create any new office inconsistent with the constitution or prejudicial to the subject (*k*).

(*a*) As to the personal liability of public officers and servants of the Crown for illegal official acts, see p. 383, *ante*. For bad advice given to the Crown ministers are responsible to Parliament.

(*b*) As to the doctrine of ministerial responsibility, see Vol. VII., Part VI., sects. 1, 2. As to impeachment, see title PARLIAMENT. The conduct of the executive in this impersonal manner has become a settled conventional or customary usage of the constitution since the revolution of 1688, and the rules relating to the Cabinet system have also become conventional or customary, because they enable responsibility to be fixed with certainty, thus ensuring that the executive is carried on conformably to the wishes of the House of Commons, and ultimately to the wishes of the electorate. As to the conduct of the executive generally, see Vol. VII., Part VI.

(*c*) Bac. Abr. tit. Prerog. D 1. As to the duty imposed upon the Crown to govern according to law by the terms of the coronation oath, and at common law, see pp. 338, 372, *ante*.

(*d*) Bac. Abr. tit. Prerog. D 3.

(*e*) *R.* v. *Larwood* (1694), 1 Ld. Raym. 29, 32, 33; *R.* v. *Clarke* (1787), 1 Term Rep. 679, 682, 686.

(*f*) *Morris* v. *Burdett* (1813), 2 M. & S. 212, *per* Lord ELLENBOROUGH, C.J., at p. 218. Therefore lawyers were bound to accept the degree of serjeant-at-law, which appears sometimes to have been distasteful (2 Co. Inst. 214; *Morris* v. *Burdett*, *supra*). And a person called upon to perform the duty of sheriff cannot refuse (*R.* v. *Larwood* (1694), 1 Ld. Raym. 29, 32, 33); nor may jurymen or parish officers (*R.* v. *Clarke* (1787), 1 Term Rep. 679, 682, 684); and dignities and honours cannot, it seems, legally be refused (see p. 456, *post*, and title DIGNITIES). A person summoned to the House of Lords, or elected to the Commons, may be punished for refusal to become a member (4 Co. Inst. 43, 44; *Duke of Queensberry's Case* (1719), 1 P. Wms. 582, at p. 592; *Morris* v. *Burdett*, *supra*, at p. 214; statutes 5 Ric. 2, stat. 2, c. 4; 6 Hen. 8, c. 16).

(*g*) *R.* v. *Clarke* (1787), 1 Term Rep. 679, 682, 685, 686. Such exemptions are construed strictly (*ibid.*, 685). As to exemption from the office of sheriff, see *R.* v. *Larwood* (1694), 1 Ld. Raym. 29, 32, 33, and title SHERIFFS AND BAILIFFS. The King cannot exempt a person from attending as a member of Parliament (4 Co. Inst. 49; *Morris* v. *Burdett* (1813), 2 M. & S. 212, 214, 218).

(*h*) 2 Co. Inst. 533, 534.

(*i*) *Ibid.*

(*k*) 2 Co. Inst. 478, 540; 4 *ibid.*, 163. See also the Civil List and Secret

SECT. 2. The Crown in Relation to the Executive.

Executive documents.

581. The principal documents by means of which the Crown carries into effect or makes known its intentions with regard to such matters as are left to its control, either by the common or statute law, are treaties, Orders in Council, writs, proclamations, letters patent under the Great Seal, and warrants, commissions, instructions, or orders under the sign manual (*l*).

SECT. 3.—*The Crown in Relation to Parliament.*

SUB-SECT. 1.—*The Crown a necessary Party to Legislation.*

Crown a necessary party to legislation.

582. All laws are enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled and by the authority of the same (*m*). The Crown is therefore a necessary party to legislation, and neither House of Parliament, whether acting alone or in conjunction with the other House, has any power of legislation without the Crown (*n*). Nor can the Crown, by proclamation or otherwise, make or unmake any law on its own authority apart from Parliament (*o*), except in colonies to which representative institutions have not been granted (*p*).

Grants conferring power to make bye-laws.

At common law, however, the Crown might legally confer the power to make bye-laws upon corporations created by charter (*q*), though the scope of the authority to do so must be understood as strictly limited by the rules and restrictions relating to royal grants (*r*). On certain occasions also the Crown has claimed the right of legislating for the Channel Islands by Order in Council; the claim has not, however, been enforced, and its legality has been seriously doubted (*s*).

Service Money Act, 1782 (22 Geo. 3, c. 82), s. 1 (now repealed). By this Act the office of Secretary of State for the Colonies, the Board of Trade and Plantations, the offices of lords of police in Scotland, the principal officers of the Board of Works, the great wardrobe, and the jewel office, the offices of treasurer of the chamber, the cofferer of the household, the six clerks of the Board of Green Cloth, the paymaster of the pensions, the master of the harriers and foxhounds, and the master of the staghounds were suppressed and abolished. S. 2, which is still in force, provides that if any office of the same name, nature, purpose, or description of those abolished is afterwards established, the same is to be deemed and taken as a new office.

(*l*) These are treated of in detail hereafter. See Vol. VII., Part VI., sect. 1, sub-sect. 2.

(*m*) See the enacting clause of any statute.

(*n*) See the statute 12 Car. 2, c. 30, and the statute Revocatio Novarum Ordinationum, 1322 (15 Edw. 2) (as to the effect of these enactments, see p. 374, *ante*). In *Stockdale* v. *Hansard* (1839), 9 Ad. & El. 1, the authority of the House of Commons was pleaded in justification of the publication of a parliamentary report containing a libel upon Stockdale, but it was held that the House of Commons could not, by its resolution, alter the law so as to make defamatory matter non-libellous. As to the statutory protection of parliamentary debates etc., see titles LIBEL AND SLANDER; PARLIAMENT.

(*o*) See *Re Grazebrook, Ex parte Chavasse* (1865), 4 De G. J. & Sm. 655, 662. As to proclamations by the Crown, see Vol. VII., Part VI., sect. 1, sub-sect. 2.

(*p*) See p. 423, *post*, and title DEPENDENCIES AND COLONIES.

(*q*) See title CORPORATIONS. As to the present statutory authority for creating municipal corporations, see title LOCAL GOVERNMENT.

(*r*) See, as to the rules relating to royal grants, pp. 476, 493, *post*.

(*s*) Orders in Council of the 11th February, 1852, were issued by the Crown to remedy judicial abuses in the islands. The legislatures, or states, of the

Convention Parliaments.

583. A new Parliament cannot legally assemble without the royal writ (*t*), and though on certain occasions, through the necessity occasioned by the King's absence or abdication, the two Houses have met and transacted business in an irregular manner without the royal writ, such meetings are termed Convention Parliaments, to distinguish them from Parliaments proper, and their proceedings are not recognised legally unless subsequently ratified by statute (*u*).

King must meet Parliament.

584. On the assembling of a new Parliament in pursuance of the royal writs, or at the commencement of a new session of an already existing Parliament after prorogation, the King must meet the two Houses either in person or by his representatives (*x*); otherwise there can be no legal beginning of a new Parliament, or session of an existing Parliament (*a*), except in the case of the demise of the Crown (*b*). But when thus assembled either House can in general initiate legislation without the intervention of the Crown, though

islands objected, but passed local Acts in accordance to some extent with the orders. The case being remitted to a committee of the Privy Council, the question was not decided, but grave doubts were expressed as to the legality of the orders (*Re the States of Jersey* (1853), 9 Moo. P. C. C. 185). The orders were accordingly revoked by Order in Council, 29th December, 1853. The same question came before a committee of the Privy Council in 1894 with reference to orders relating to the prison board, when a similar course was adopted.

(*t*) 1 Bl. Com., 14th ed., 149. As to the issue of such writs generally, see title PARLIAMENT. As to the necessity for an annual meeting of Parliament see *ibid.*, and p. 383, *ante*.

(*u*) The mode of summoning the Convention Parliament, which offered the Crown to William and Mary in 1688, and the subsequent legalisation of its actions are treated of in note (*n*), p. 321, *ante*. The Convention Parliament, which restored Charles II. in 1660, met in pursuance of writs issued in the name of the keepers of the liberty of England by authority of Parliament, and this Parliament sat for seven months after the Restoration and enacted statutes some of which are still in force (see 1 Bl. Com., 14th ed., 151). After the return of Charles II. the first Act passed declared the Parliament begun and holden at Westminster in 1640 to be dissolved, the Lords and Commons then sitting to be the two Houses of Parliament for all purposes, notwithstanding the absence of the royal writs (12 Car. 2, c. 1, since repealed). It was, however, still maintained by some that the Long Parliament summoned originally by Charles I. in 1640 was still undissolved, and that the statute 12 Car. 2, c. 1, was of no effect (see as to the impeachment of William Drake for writing a pamphlet to that effect, Commons' Journal, 20th November, 1660). The Acts of the Convention Parliament were further legalised by two Acts of the next Parliament (13 Car. 2, cc. 7, 14).

(*x*) For the ceremonies observed on the meeting of Parliament, see title PARLIAMENT. When not present in person, the Sovereign is represented by Lords Commissioners, and the Speech from the Throne is usually read by the Lord Chancellor.

(*a*) 4 Co. Inst. 6; 1 Bl. Com., 14th ed., 153.

(*b*) On the demise of the Crown, Parliament, if separated by adjournment or prorogation, is to meet and sit immediately (Succession to the Crown Act, 1707 (6 Ann. c. 41 (c. 7 Ruff.), s. 5), and in the case of a demise after dissolution or expiration of an existing Parliament, and before the date fixed for the meeting of a new Parliament, the previous Parliament is revived for six months (Meeting of Parliament Act, 1797 (37 Geo. 3, c. 127), s. 3). In these cases Parliament need not (*semble*) be met by the Sovereign. See also p. 384, *ante*, and title PARLIAMENT.

SECT. 3. The Crown in Relation to Parliament.

the Speech from the Throne usually indicates to some extent the outline of future legislation (*c*). It is, however, a constitutional principle that no Bill creating a charge upon the public revenues, whether payable out of the Consolidated Fund or out of money to be provided by Parliament, shall be introduced in the Commons except upon the recommendation of the Crown expressed through a member of the ministry (*d*).

SUB-SECT. 3.—*The Royal Assent and Right of Veto.*

Royal assent and right of veto.

585. Though passed by both Houses of Parliament, a Bill does not become law until it has received the royal assent, which may be affixed either by the Sovereign in person or by commission (*e*). By withholding its assent the Crown may in effect veto any particular measure. This right of veto has not, however, been exercised since the year 1707 (*f*), and, under ordinary circumstances, is contrary to the customary or conventional law of the constitution, the proper procedure where the Crown is opposed to a measure being either to dissuade ministers from introducing the Bill, or, failing this, to dismiss the ministry and appoint a new one (*g*), or to appeal to the nation by dissolving Parliament (*h*).

SUB-SECT. 4.—*Dissolution, Prorogation, and Adjournment.*

Dissolution etc. of Parliament.

586. As the intervention of the Crown is necessary to the legal commencement of a Parliament, so also, except in the case of effluxion of time (*i*), an existing Parliament can only be put an end to by an exercise of the royal prerogative (*k*). Parliament may be so dissolved at any time, but by the customary or conventional usage of the constitution the exercise of this prerogative is confined to occasions upon which the Sovereign has reason to suppose either that the ministry no longer enjoys the confidence of the House of Commons or that the Parliament itself is no longer representative of the wishes of the electorate (*l*).

(*c*) See title PARLIAMENT.

(*d*) The observance of this principle is enforced by standing orders of the House of Commons (1908) (Public Business, No. 66, and as to India, No. 70). The effect of the rule is that Bills imposing or altering the imposition of new taxation upon the people must be introduced by a member of the ministry. See also title PARLIAMENT.

(*e*) As to the manner of affixing the royal assent, and the date at which the Act comes into force, see title PARLIAMENT. Until they have received the royal assent, Bills are not statutes and have no legal effect (see *R.* v. *Middlesex Justices* (1831), 2 B. & Ad. 818). Thus, the Acts of the Long Parliament between 1640 and 1660 having no legal effect are not printed in our statute books, and are usually termed ordinances. As to the inability of the two Houses of Parliament to bind the Crown, see pp. 376, 388, *ante*.

(*f*) On this occasion Queen Anne refused her assent to the Scotch Militia Bill.

(*g*) As to the appointment and dismissal of ministers, see Vol. VIII., Part VI., sect. 2.

(*h*) As to the dissolution of Parliament, see title PARLIAMENT.

(*i*) See title PARLIAMENT.

(*k*) As to the manner of dissolving Parliament, see *ibid.*

(*l*) The most usual occasion for the exercise of this prerogative is when the House of Commons has failed to support the ministry in passing an important or party measure, or has passed a vote of want of confidence in the Government.

A session of an existing Parliament can only be terminated by the Crown by prorogation, which is the continuation of the Parliament from one session to another, and affects both Houses (*m*). But an adjournment or postponement of business, either in the Lords or Commons, for a definite time, can be effected by resolution of either House, without the intervention of the Crown (*n*), though a desire expressed by the Crown for the adjournment of both or either of the two Houses is, it seems, usually complied with (*o*).

SUB-SECT. 5.—*Right of Access to the Sovereign.*

Access to Sovereign.

587. Either House of Parliament enjoys the privilege of right of access at all times to the Sovereign, but in the case of the House of Commons this right must be exercised collectively through the Speaker, whilst Peers may exercise the right individually (*p*).

SUB-SECT. 6.—*Control of the Executive by Parliament.*

Executive controlled by Parliament.

588. By the conventional or customary usage of the constitution the principal executive officers, who compose the ministry, are selected by the Crown, or by the Prime Minister as representing the Crown, from amongst the members in either House whose political sympathies are at one with those of the dominating party in the House of Commons (*q*). The conduct of the executive is thus brought under the immediate supervision and control of Parliament.

SECT. 4.—*The Crown in Relation to the Church.*

SUB-SECT. 1.—*In General.*

Head of the Church.

589. At common law and by statute the King is the only supreme head on earth, under God, of the Church of England (*r*),

Occasions have arisen, as in 1784 and 1807, where the Crown has dismissed a ministry which retained the confidence of the House of Commons, but in such a case there ought to be good grounds for the belief that the wishes of the House of Commons are opposed to the wishes of the electorate. The conformability of the wishes of the House of Commons to those of the electorate is the constitutional result to be aimed at in all cases, and not merely the arbitrary assertion of the personal wishes of the Sovereign.

(*m*) 1 Bl. Com., 14th ed., 187. Formerly the royal assent was given to Bills at the end of each session, and it became a question whether the session was not *ipso facto* terminated by affixing the royal assent to any Bill. The contrary was declared to be the case both by resolution of the House of Commons (see Commons' Journal, 21st October, 1553; *ibid.*, 21st November, 1554), and by statute (1625) 1 Car. 1, c. 7. As to the manner in which prorogation is effected, see title PARLIAMENT.

(*n*) 1 Bl. Com., 14th ed., 186. As to adjournment generally, see title PARLIAMENT.

(*o*) See Commons' Journal, 11th June, 1572; 5th April, 1604; 4th June, 14th November, 18th December, 1621; 11th July, 1625; 13th September, 1660; 25th July, 1667; 4th August, 1685; 24th February, 1691; 21st June, 1712; 16th April, 1717; 3rd February, 1741; 10th December, 1745; 21st May, 1768.

(*p*) See title PARLIAMENT.

(*q*) As to the formation of the ministry and the Cabinet system, see Vol. VII., Part VI., sect. 2.

(*r*) 31 Hen. 8, c. 10, s. 2; Com. Dig. tit. Prerog. D 17. See also 24 Hen. 8,

SECT. 4. The Crown in Relation to the Church.

and all spiritual and ecclesiastical jurisdictions, privileges, superiorities, and pre-eminences are united and annexed to the Imperial Crown of this realm to the exclusion of every foreign prince, person, prelate, State, or potentate, spiritual or temporal (*s*).

Nomination of archbishops and bishops.

As head of the Church the Sovereign is also the patron of all archbishoprics and bishoprics within the kingdom (*t*), and upon a vacancy nominates archbishops and bishops to the dean and chapter for election, or, in the case of certain bishoprics, nominates and presents by letters patent without election (*a*).

During a vacancy the temporalities of bishoprics belong to the Sovereign (*b*), but he acts as a mere custodian thereof, and on the consecration of a new archbishop or bishop it is customary to restore them intact (*c*). If they are not restored, the bishop, who, after doing homage, has a fee simple in the bishopric, may maintain an action for their recovery (*d*). On avoidances occurring the temporalities of all archbishoprics and bishoprics (except rights of

c. 12; 25 Hen. 8, cc. 19, 21; 28 Hen. 8, c. 16; 1 Eliz. c. 1. The statutory provisions relating to the supremacy of the King in spiritual matters are declaratory of the common law (see 26 Hen. 8, c. 1), repealed by 1 & 2 Phil. & Mar. c. 8, s. 4; 1 Eliz. c. 1, s. 4; *Caudrey's Case* (1591), 5 Co. Rep. 1a, 8a.

(*s*) 1 Eliz. c. 1. The jurisdiction etc. so vested in the Crown are "such as have heretofore been, or lawfully may be, exercised by any ecclesiastical power or authority for the visitation of the ecclesiastical state and persons, and for reformation order and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities." It is a statutory offence for any person, by writing or printing, teaching, express words, deed or act, advisedly, maliciously, and directly to affirm, hold, stand with, set forth, maintain, or defend any such foreign authority or jurisdiction etc. (*ibid.*). The punishment provided for this offence has been repealed (Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), s. 1); but disobedience to a statutory provision is punishable as a contempt at common law by fine and imprisonment at the discretion of the court (see 4 Bl. Com., 14th ed., 122, 123), and, in the case of persons in holy orders, the above offence entails incapability of holding any ecclesiastical promotion, and deprivation of any such promotion in possession in the same manner by due course of law as for any other cause of deprivation (see the Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), s. 1, and title ECCLESIASTICAL LAW). As to the constitution and jurisdiction of the ecclesiastical courts generally, see titles COURTS; ECCLESIASTICAL LAW.

(*t*) Coke bases the reason for this prerogative on the ground that bishoprics are of the King's foundation (see 1 Co. Inst. 134, 344, and as to Wales, *ibid.*, 97). As to this prerogative generally, see *Hampden's Case* (1848), Jebb's Report. Bishoprics are now invariably founded by the Crown by Order in Council under statutory authority. See the Acts cited in note (*s*), p. 397, *post*.

(*a*) As to the appointment of bishops, see pp. 395, 399, *post*, and title ECCLESIASTICAL LAW.

(*b*) 2 Co. Inst. 15; Com. Dig. tit. Prerog. D 23. At common law the King had the custody of the temporalities for purposes of protection against spoliation, with the right to take to himself the intermediate profits, but he had not the temporalities themselves (see 1 Bl. Com., 14th ed., 282).

(*c*) 1 Bl. Com., 14th ed., 282, 283. Formerly it was a ground of complaint that the Crown committed waste, and frequently seized the temporalities into its own hands during the life of the bishops. These abuses were remedied by a variety of statutes from Magna Carta onwards (*e.g.*, 9 Hen. 3, c. 5; Statute of Westminster the First, 1275 (3 Edw. 1, c. 21, now repealed); 14 Edw. 3, stat. 4, c 4, now repealed).

(*d*) Co. Litt. 67 a, 341 a, b.

patronage and presentation, and such residences and lands which may be necessary for the enjoyment of the residences and attached thereto by any scheme sanctioned by Order in Council) become vested absolutely in the Ecclesiastical Commissioners, and the archbishop receives a fixed income in lieu of the former profits of the see (*e*).

The Sovereign also enjoys the right of presenting to all dignities and benefices of the advowson of the archbishopric or bishopric during a vacancy (*f*).

Right of presentation.

590. The Sovereign is patron paramount of all benefices in England, and as such is entitled to the right of presentation by lapse to all such as are not regularly filled (*g*). He is also entitled, upon promotion of any incumbent to a bishopric, to present to such benefices or dignities as the person promoted was possessed of, although the advowson itself belongs to a private person (*h*).

Convocations and canons.

591. As head of the Church the King also convenes, prorogues, and controls the ecclesiastical synods or convocations (*i*) of Canterbury and York, and his licence and assent is necessary before canons can be enacted (*k*). When enacted and promulgated (*l*), such canons bind the clergy; but they require the authority of an Act of Parliament before they become binding upon the laity (*m*). Such canons as are binding upon the clergy cannot be executed if contrary to the common or statute law, the King's prerogative, or the custom of the realm (*n*).

First fruits.

592. Another branch of this part of the royal prerogative is the right of the Crown to first fruits, which consist of the first year's

(*e*) Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), s. 1. A similar arrangement could be made voluntarily by bishops succeeding on avoidances before the 28th August, 1860 (see *ibid.* s. 4). As to the purposes for which the temporalities are to be held by the commissioners, see title ECCLESIASTICAL LAW.

(*f*) Bac. Abr. tit. Prerog. D 2; and see *Potter* v. *Chapman* (1750), Amb. 98, 101.

(*g*) Bac. Abr. tit. Prerog. D 2. As to lapse generally, see title ECCLESIASTICAL LAW.

(*h*) See *A.-G.* v. *London* (*Bishop*) *and Others* (1693), 4 Mod. Rep. 200; *Troward* v. *Calland* (1796), 8 Bro. Parl. Cas. 71.

(*i*) 25 Hen. 8, c. 19. This enactment is, however, only declaratory of the common law. See *Case of Convocations* (1610), 12 Co. Rep. 72. See also 4 Co. Inst. 322, 323. For the manner in which convocations are convened, prorogued, etc., and their composition, see title ECCLESIASTICAL LAW.

(*k*) 25 Hen. 8, c. 19. The King's licence is required before convocations can even confer to enact a canon. See *Case of Convocations, supra.* It is, however, customary for convocation to discuss many matters without the royal licence, and these are subsequently embodied in synodical Acts which have no legal force.

(*l*) For the procedure on the enactment and promulgation of canons, see title ECCLESIASTICAL LAW.

(*m*) *Cox's Case* (1700), 1 P. Wms. 29; *Middleton* v. *Crofts* (1736), 2 Atk. 650; *More* v. *More* (1741), 2 Atk. 157. As to the legal effect of canons generally, see title ECCLESIASTICAL LAW.

(*n*) 25 Hen. 8, c. 19, s. 3; *Case of Convocations, supra.*

SECT. 4. The Crown in Relation to the Church.

whole profits of any spiritual preferment, and to tenths, which consist of the tenth part of the annual revenues and profits (*o*). These are now rated according to a statutory valuation, and are made payable to the Governors of Queen Anne's Bounty (*p*) to form a fund for the augmentation of poor livings (*q*). They are apportionable between successive bishops *inter se*, but not as against the Crown or the treasurer of Queen Anne's Bounty (*r*).

Tithes.

The Crown also enjoys the right to all tithes in extra-parochial places upon an implied trust to distribute them for the general good of the clergy, but may grant them to a subject (*s*).

Corodies.

The right of the Crown to corodies, namely, to send one of its chaplains to be maintained by the bishop, or to have a pension allowed him until the bishop promotes him to a benefice, appears to have fallen into disuse (*t*).

Ecclesiastical suits.

593. As head of the Church the Sovereign is the ultimate court of appeal in ecclesiastical suits (*u*); this appellate jurisdiction has since 1833 been exercised by the Judicial Committee of the Privy Council (*x*).

Jews may not appoint to royal benefices.

594. The Crown also enjoys the rights of patronage with regard to various churches throughout the Kingdom (*a*). Where any

(*o*) 26 Hen. 8, c. 3, ss. 2, 9; *Rochester* (*Bishop*) v. *Le Fanu*, [1906] 2 Ch. 513, 518. First fruits and tenths were first introduced into this country, it is said, by Pandulph, the Pope's legate *temp.* John and Henry III. in the see of Norwich (1 Bl. Com., 14th ed., 283; *Rochester* (*Bishop*) v. *Le Fanu*, *supra*). They were made payable to the Crown out of all benefices by stat. 26 Hen. 8, c. 3, *supra*, and enforceable by writ of extent by stat. 33 Hen. 8, c. 39, s. 55 (see *Rochester* (*Bishop*) v. *Le Fanu*, *supra*, pp. 518, 519). They were resigned by Queen Anne to trustees, to form the fund now called Queen Anne's Bounty (2 & 3 Ann. c. 20 (c. 11, Ruff.), s. 1). And see, generally, title ECCLESIASTICAL LAW.

(*p*) Viz., £1, and 17*s.* 6*d.* for every £100 of the annual income of the see in the case of first fruits and tenths respectively by Order in Council, November 27th, 1852, made under the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77). See *London Gazette*, 17th December, 1852, p. 3667; *Rochester* (*Bishop*) v. *Le Fanu*, *supra*, at p. 520.

(*q*) See note (*o*), *supra*. As to collection by the treasurer of Queen Anne's Bounty, see Queen Anne's Bounty Acts, 1716 and 1838 (3 Geo. 1, c. 10), s. 3 (1 & 2 Vict. c. 20), ss. 3 and 4, and title ECCLESIASTICAL LAW.

(*r*) *Rochester* (*Bishop*) v. *Le Fanu*, [1906] 2 Ch. 513; and see Apportionment Act, 1870 (33 & 34 Vict. c. 35).

(*s*) 2 Co. Inst. 647; *Winchester's* (*Bishop*) *Case* (1596), 2 Co. Rep. 44; *Wright* v. *Wright* (1596), Cro. Eliz. 511, 512. See also title ECCLESIASTICAL LAW.

(*t*) 1 Bl. Com., 14th ed., 283.

(*u*) 2 Bl. Com., 14th ed., 280.

(*x*) Privy Council Appeals Act, 1832 (2 & 3 Will. 4, c. 92). Under the statute 25 Hen. 8, c. 19, ss. 4, 5, ecclesiastical appeals were to be taken to the King in the King's Court of Chancery, to be determined by commissioners appointed by the King, and appeals to Rome were restrained on pain of *præmunire*. This court was known as the High Court of Delegates, and its jurisdiction, abolished by statute in 1832, was restored to the King in Council (Privy Council Appeals Act, 1832 (2 & 3 Will. 4, c. 92)), the Judicial Committee of the Privy Council being constituted in the following year. As to the composition and jurisdiction of the Judicial Committee generally, see titles COURTS; ECCLESIASTICAL LAW.

(*a*) As to livings under £20, see Vol. VII., p. 64.

right of presentation to any ecclesiastical benefice belongs to any office in the gift or appointment of the Sovereign, and the office is held by any person professing the Jewish religion, the right of presentation is to devolve upon and be exercised by the Archbishop of Canterbury. No person professing the Jewish religion may lawfully, either directly or indirectly, advise the Sovereign, or any person holding the office of guardian or regent of the United Kingdom (under whatever name, style, or title such office is constituted), or the Lord Lieutenant of Ireland, touching or concerning the appointment to, or disposal of, any office or preferment in the Church of England or Scotland. Any person offending in either of the above cases, and being convicted by due course of law, is to be guilty of a high misdemeanour and disabled for ever from holding any office, civil or military, under the Crown (*b*).

Jews may not advise the Crown as to presentations.

Penalty.

SUB-SECT. 2.—*Appointment of Archbishops and Bishops.*

595. Upon an avoidance of any archbishopric or bishopric (*c*) within the British dominions (*d*), the Crown may grant to the dean and chapter of the cathedral of the void see a licence under the Great Seal (termed a *congé d'élire*) to proceed to the election of an archbishop or bishop, with a letter missive containing the name of the person to be elected (*e*).

Congé d'élire.

596. The dean and chapter must with due speed and celerity, and in due form, elect and choose the person nominated, and none other, to the void archbishopric or bishopric within twelve days next after the delivery to them of such licence and letter missive, and the election is to stand good and effectual to all intents, and after certification made under the common seal of the dean and chapter to the Crown, the person elected is to be reputed and

Election.

(*b*) Jews Relief Act, 1858 (21 & 22 Vict. c. 49), s. 4.

(*c*) Avoidance in ordinary cases takes place either by death or translation (as to resignation and compulsory retirement, and as to the power of deprivation exercisable by archbishops, see title ECCLESIASTICAL LAW). An ordinary vacancy ought to be certified to the Crown in Chancery by the dean and chapter, who pray leave of the King to make election (Godolphin's Repertorium Canonicum, 29; *Evans and Kiffins* v. *Askwith* (1628), W. Jo. 158, 160. For form, see *Hampden's Case* (1848), Jebb's Report, p. 3. The practice is, however, sometimes omitted (*Hampden's Case, supra*, p. 2, note (a)). The bishoprics to which the provisions of the statute 25 Hen. 8, c. 20, apply are now about twenty-five in number. See *R.* v. *Canterbury* (*Archbishop*), [1902] 2 K. B. 503, 518.

(*d*) The words of the Act are "within the realm, and in all other the King's dominions" (25 Hen. 8, c. 20), s. 2).

(*e*) *Ibid.* Presentation to the Pope and see of Rome, and the procuring of papal bulls, palls etc., and the payment of *annates*, first fruits, or other sums of money thereto, are forbidden by the Act (*ibid.*, s. 3). As to how far this mode of nomination is compulsory on the Crown, or whether bishoprics may be donative simply, see *Hampden's Case* (1848), Jebb's Report, *sub nom. R.* v. *Canterbury* (*Archbishop*) (1848), 11 Q. B. 483. For forms of *congé d'élire* and letters missive, see *Hampden's Case* (1848), Jebb's Report, pp. 2—4. The letters missive are given under the signet (*ibid.*, p. 4).

SECT. 4. The Crown in Relation to the Church.

taken by the name of lord elect of the particular archbishopric or bishopric (*f*).

If the dean and chapter of the cathedral, where the see of the archbishop or bishop is within any of the King's dominions, do not proceed to election and signify the same within twenty days after the licence comes into their hands, they and their aiders, counsellors, and abettors incur the dangers, pains, and penalties of a *præmunire* (*g*).

Right of Crown to present.

597. If the dean and chapter defer the election above twelve days after the delivery to them of the licence and letter missive, the Crown (*h*), at its liberty and pleasure, by letters patent under the Great Seal nominates and presents such person as it thinks able and convenient for the vacant office and dignity. The nomination and presentment in such case must be made, in the case of a bishop, to the archbishop of the province where the see is void, or if the archbishopric be void, then to such archbishop or metropolitan within the realm or any of the King's dominions as the Crown thinks fit; and in the case of an archbishop, to one such archbishop and two bishops, or else to four such bishops within the realm or any of the King's dominions as the Crown shall assign (*i*).

Signification of election.

598. In the case of bishops nominated by *congé d'élire* and letters missive, after election and certification, and the taking of such oath of fealty as shall be appointed (*k*), the Crown must signify the election, in the case of archbishops and bishops respectively, to the archbishop and bishops, or bishops only, or to the archbishop, as the case may be, requiring and commanding him or them to confirm the election and to invest and consecrate the person elected, and to

(*f*) 25 Hen. 8, c. 20, s. 3. The ceremonies on election appear to be: (1) A citatory letter under the chapter seal convening a general chapter; (2) Meeting of the general chapter, and the delivery to the dean and reading of the *congé d'élire* and letters missive by the chapter clerk; (3) Return of the citation by mandatory, calling over of the names, and assumption of directorship of the election by the dean, and pronouncement of absent members of the chapter as contumacious; (4) Pronouncement of members lawfully present a full chapter; (5) Appointment of a notary (usually the chapter clerk) and two witnesses; (6) Taking of votes, beginning with the junior member; (7) On election, which is usually unanimous (whether a majority is sufficient seems doubtful; see *Hampden's Case* (1848), Jebb's Report, 11, 12), decree of three certificates under the chapter seal—one to the Crown, one to the archbishop of the diocese, and one to the bishop elect—praying acceptance; (8) Decree of a proxy to three notaries public to deliver the certificates; (9) Publication and declaration of the election to the congregation (see *Hampden's Case, supra*, pp. 1—19. For forms see *ibid.*).

(*g*) 25 Hen. 8, c. 20, s. 7. As provided by the statutes 16 Ric. 2, c. 5, and the statutes of Provise and Præmunire (25 Edw. 3, st. 5, c. 22, and 27 Edw. 3, st. 1). As to *præmunire* see note (*e*), p. 323, *ante*.

(*h*) 25 Hen. 8, c. 20, s. 4.

(*i*) *Ibid.*

(*k*) This is the order in which the oath of fealty comes in the Act. It refers apparently to the ceremony of homage and fealty on suing the temporalities out of the King's hand, which is not performed until after consecration.

give and use to him all such benedictions, ceremonies, and other things requsite for the same without suing, procuring, or obtaining any bulls, letters, or other things from the see of Rome in respect thereof (*l*).

Confirmation of election.

599. The proceedings before and at the confirmation of the election are conducted according to the rules of ecclesiastical law (*m*).

Consecration.

600. In the case of refusal on the part of the dean and chapter to elect, every archbishop and bishop to whom the nomination and presentment (*n*) by the Crown comes must with all speed and celerity invest and consecrate the person nominated and presented, with a similar direction as in the case of elected bishops as to the benediction and ceremonies to be observed (*o*). In this case there is no direction for confirmation.

Enthronement.

601. On completion of the proper forms and ceremonies, and after suing the temporalities of the see out of the King's hand in the customary manner, and taking the corporal oath of fealty to the King as appointed (*p*), the archbishop or bishop is enthroned and installed in the archbishopric or bishopric and is entitled to restitution (*q*) out of the King's hand of all the possessions and profits spiritual and temporal belonging thereto, and is to be obeyed in, and may do and execute, all such things touching his office as are customary and not contrary to the prerogative of the Crown and the laws and customs of the realm (*r*).

Appointment of bishops by letters patent.

602. In the case of certain bishoprics created by modern statutes (*s*), until the foundation of a dean and chapter the bishops may be appointed by letters patent in like manner and with the same effect, as far as circumstances admit, as in the case of a bishop nominated by the Crown where the dean and chapter

(*l*) 25 Hen. 8, c. 20, s. 4. For form of letters patent see *Hampden's Case* (1848), Jebb's Report, p. 23.

(*m*) For the forms and ceremonies, see title ECCLESIASTICAL LAW.

(*n*) See p. 395, *ante*, as to these.

(*o*) 25 Hen. 8, c. 20, s. 5.

(*p*) The oath of allegiance is taken at confirmation. Homage is done to the King in the usual manner after consecration, and nothing in the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), is to affect the oath of homage taken by archbishops and bishops in the presence of His Majesty. For the manner in which homage is done by archbishops and bishops, see Bodley's Coronation of Edward VII., p. 446; see also note (*d*), p. 328, *ante*.

(*q*) "Shall have and take their only restitution" in the statute 25 Hen. 8, c. 20, s. 6.

(*r*) *Ibid.*

(*s*) These are St. Albans, under the Bishopric of St. Albans Act, 1875 (38 & 39 Vict. c. 34), s. 8; Truro, under the Bishopric of Truro Act, 1876 (39 & 40 Vict. c. 54), s. 6; Liverpool, Newcastle, Southwell, and Wakefield, under the Bishoprics Act, 1878 (41 & 42 Vict. c. 68), s. 6; Southwark and Birmingham, under the Bishoprics of Southwark and Birmingham Act, 1904 (4 Edw. 7, c. 30). The provisions as to appointment by letters patent before the creation of a dean and chapter contained in the Bishoprics Act, 1878 (41 & 42 Vict. c. 68), do not apply to the bishopric of Bristol as created in 1884 (Bishopric of Bristol Act, 1884 (47 & 48 Vict. c. 66), s. 3). The bishoprics of Oxford, Peterborough, Chester, Gloucester and Bristol were created under the powers conferred by

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have not proceeded to election in accordance with the royal licence and letters missive (*t*). But from and after the foundation of a dean and chapter in any such bishopric vacancies are to be filled as in other bishoprics in England (*u*).

Fees on appointment.

603. On appointment to any archbishopric or bishopric the fee of £30 is payable by means of an impressed stamp upon the grant or letters patent (*a*) :—

(1) Of a *congé d'élire* to any dean and chapter for the election of an archbishop or bishop:

(2) Of the royal assent to, or signification of, the election made by any dean and chapter, or of the nomination and presentation by His Majesty in default of such election of any person to be an archbishop or bishop:

(3) Of or for the restitution of the temporalities to any archbishop or bishop:

(4) Grant of any other honour, dignity, or promotion whatsoever (*b*).

Colonial bishops.

604. In Crown colonies (viz., colonies without representative legislatures) bishops were originally created by letters patent, but that practice appears to have been discontinued, except with regard to Mauritius (*c*). In such colonies the Crown in creating bishoprics can, it seems, confer ecclesiastical jurisdiction (*d*).

In colonies with representative legislatures, though the Crown can legally create bishops by letters patent, it cannot by so doing confer coercive jurisdiction, and obedience to such a bishop can only be enforced by the civil courts exercising their ordinary jurisdiction, as in contract or otherwise (*e*). The Crown has, however,

stat. 31 Hen. 8, c. 9 (repealed 1 & 2 Phil. & Mar. c. 8, s. 4; s. 18, Ruff.; 1 Eliz. c. 1, s. 4; s. 13, Ruff.), and though originally purely donative, have since ceased to be so (see *R.* v. *Canterbury* (*Archbishop*), [1902] 2 K. B. 503, 518). The Bishops of Calcutta (see East India Company Act, 1813 (53 Geo. 3, c. 155), ss. 49, 52) and of Madras and Bombay (see East India Company Act, 1833 (3 & 4 Will. 4, c. 85), s. 89) are appointed directly by the Crown by letters patent.

(*t*) As to the mode of nomination in such cases, see pp. 395, 396, *ante*.

(*u*) See the Acts cited in note (*s*), on p. 397, *ante*. As to the mode of filling vacancies in such cases, see pp. 395, 396, *ante*. A dean and chapter has been created for Southwark.

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 2, Sched. I. The fee is payable whether the grant or letters patent are under the Great Seal or Wafer Great Seal of the United Kingdom, or of Ireland, or the seal of the Duchy or county palatine of Lancaster, or the seal kept and used in Scotland in place of the Great Seal formerly used there (*ibid.*).

(*b*) This provision would (*semble*) embrace all appointments to bishoprics not falling under (1) and (2). See also as to stamps for a similar amount on any franchise, liberty, or privilege given to any person, body politic or corporate, p. 493, *post*.

(*c*) *R.* v. *Canterbury* (*Archbishop*), *supra*. Mauritius enjoys partly representative institutions, and is therefore not strictly a Crown colony. See title DEPENDENCIES AND COLONIES.

(*d*) See p. 426, *post*, and titles COURTS; DEPENDENCIES AND COLONIES.

(*e*) *Natal* (*Bishop*) v. *Gladstone* (1866), L. R. 3 Eq. 1; *Re Natal* (*Bishop*) (1864), 3 Moo. P. C. C. (N. S.) 115; *Long* v. *Capetown* (*Bishop*) (1863), 1 Moo. P. C. C. (N. S.) 411; *Forbes* v. *Eden* (1867), L. R. 1 Sc. & Div. 568.

ceased to appoint bishops in such colonies by letters patent (*f*). But when a colonial bishop is consecrated in England, it is customary, it seems, for the Crown to issue a licence to the archbishop for that purpose (*g*).

In the colonies, as also, it seems, in Ireland (since the disestablishment of the Irish Church in 1869 (*h*)), the Church, in so far as it is not regulated by Act of the Imperial or colonial legislatures, is in the position of a voluntary society (*i*), and can make such rules for its own organisation, and the appointment and consecration of its bishops, as it pleases. The licence or assent of the Crown to such appointments, unless required by statute, is therefore not legally necessary.

SECT. 5.—*The Crown in Relation to the Law.*

SUB-SECT. 1.—*The Crown the Source of all Jurisdiction.*

Sovereign as the source of justice.

605. The Sovereign, by virtue of the prerogative, is the source and fountain of justice, and all jurisdiction exercised within the British dominions is derived from him (*k*). Hence, in legal contemplation, the King's Majesty is deemed always to be present in court (*l*), and he is bound by the terms of the coronation oath and by the maxims of the common law, as also by the ancient charters and statutes confirming the liberties of the subject, to cause law and justice in mercy to be administered in all judgments (*m*). This is, however, a purely impersonal conception: for the King cannot himself execute any office relating to the administration of justice (*n*) nor effect an arrest in person (*o*); and, though all criminal suits must be brought in his name, he cannot be nonsuited, either in criminal or civil proceedings (*p*).

(*f*) 2 Phill. Eccl. Law, 2nd ed., p. 1786.

(*g*) As to the Church in the colonies generally, see titles DEPENDENCIES AND COLONIES; ECCLESIASTICAL LAW.

(*h*) Irish Church Act, 1869 (32 & 33 Vict. c. 42).

(*i*) *Forbes* v. *Eden* (1867), L. R. 1 Sc. & Div. 568; *Natal* (*Bishop*) v. *Green* (1868), 18 L. T. 112. As to the preservation of the Presbyterian Church in Scotland under the Union with Scotland Act, 1706 (6 Ann. c. 11; c. 8, Ruff.), see p. 325, *ante*. As to the appointment of bishops for foreign countries, see title ECCLESIASTICAL LAW.

(*k*) Bac. Abr. tit. Prerog. D 1.

(*l*) 1 Bl. Com., 14th ed., 269.

(*m*) See pp. 339, 378, *ante*.

(*n*) 2 Co. Inst. 187; 4 *ibid.* 71.

(*o*) Bac. Abr. tit. Prerog. E 1; 1 Bl. Com., 14th ed., 269; Bro. Abr. tit. Prerog. 125; Co. Litt. 3 b. In early times the King sat in person in the *Aula Regis*, or King's Court, which followed the King from place to place, and its records were called *coram rege* rolls. By Magna Carta, 1215, it was provided that the Common Pleas were not to follow the King's Court, but were to be held in some certain place, and that no sheriff, constable, coroner, or other officer of the Crown was to hold pleas of the Crown. The Common Pleas became fixed at Westminster—at any rate, by the reign of Henry III.—the King's Bench followed this example, and the King ceased to sit in person. James I. is said to have endeavoured to revive the practice of sitting in court, but was informed by the judges that he could not deliver an opinion (12 Co. Rep. 65; see 3 Steph. Com., 4th ed., 357, n.).

(*p*) The proper course in such cases is for the Attorney-General to enter a *non vult prosequi*, which has a similar effect to a non-suit (Co. Litt. 139 b; Bac. Abr. tit. Prerog. E 7).

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Writs and legal process.

606. All writs and legal processes run in the Sovereign's name, and are executed by his officers; and all judges and magistrates are appointed by and derive their authority, either mediately or immediately, from him (*a*). But they must exercise their authority in a lawful manner, without deviating from the known and stated forms (*b*); for the laws are the birth-right of the people (*c*), and the Sovereign has no power to change them apart from Parliament (*d*). Nor may he interfere with the due administration of justice (*e*), and although his person is above the reach of the law, it is his duty to obey it (*f*).

Counties palatine.

607. The prerogatives relating to the distribution of justice are, in general, inherent in and inseparable from the Crown (*g*), and though they formerly passed by way of franchise, along with the full *jura regalia*, to the grantees of the counties palatine of Durham, Chester, and Lancaster, the prerogative rights relating to justice within such counties palatine are now revested in the Crown (*h*).

(*a*) Bac. Abr. Prerog. D 1. As to the appointment of judges and magistrates, see titles COUNTY COURTS; COURTS; MAGISTRATES.

(*b*) *Ibid.*

(*c*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3.

(*d*) *Re Grazebrook, Ex parte Chavasse* (1865), 4 De G. J. & Sm. 655, 662; see also pp. 339, 377, *ante*.

(*e*) See p. 388, *ante*.

(*f*) See pp. 374, 378, *ante*.

(*g*) See Bac. Abr. tit. Prerog. D 1; *Christian* v. *Corren* (1716), 1 P. Wms. 329, 330.

(*h*) Lancaster was created a county palatine by charter having the authority of Parliament (4 Co. Inst. 205, 211; and see Vol. VII., Part VII., sect. 4, as to the creation and history of the franchise), whilst Durham and Chester are such by prescription or custom at least as old as the Conquest (4 Co. Inst. 211, 216). The county palatine of Durham was conferred, it seems, by the Conqueror upon the Bishop of Durham, whilst Chester was granted by the same King to his nephew Hugh Lupus. They were created as a means of defence against the inroads of the Scotch and Welsh. See Selden, Tit. Hon. 2, 5, 8; 4 Bl. Com., 14th ed., 116, 117). The owners of the county palatine might pardon offences, make justices of eyre, of assize and gaol delivery, and of the peace, and judicial writs, indictments, and processes ran in their names to the exclusion of the King's writ (4 Co. Inst. 204, 205). The right of pardoning offences, together with that of appointing justices of eyre, of assize, of the peace, and of gaol delivery, and the issue of writs and judicial processes, were revested in the Crown by statute (27 Hen. 8, c. 24, ss. 1, 2, 3), which, however, provided that justices of assize, of gaol delivery, and of the peace in Lancaster were to be appointed under the seal of Lancaster, and that the *teste* to the writs etc. in the counties palatine was to be in the name of the owner of the franchise. It was subsequently provided that the Bishop of Durham should have and exercise episcopal and ecclesiastical jurisdiction only, and that from the 21st June, 1836, the palatine jurisdiction and authority formerly vested in the said bishop should be separated from the bishopric and transferred to and vested in the Crown as a franchise and royalty separate from the Crown, in as large and ample a manner as the same had theretofore been exercised and enjoyed, but that the jurisdiction of the palatine courts was not thereby to be affected. The custos rotulorum of the county of Durham was thenceforth (and is still) to be appointed by the Crown (Durham (County Palatine) Act, 1836 (6 & 7 Will. 4, c. 19, ss. 1, 3. As to the meaning of the words "county of Durham" in the Act, see *ibid.*, s. 7. The rights of persons holding a patent of any office, whether abolished by the Act or not, to receive any fee or stipend granted by such patent out of the revenues of the bishopric were preserved by s. 6). The manner in which the palatine jurisdiction and prerogative of Lancaster became vested in the Crown is treated of in Vol. VII., Part VII., sect. 4.

It would seem that grants of a like nature would now require the authority of an Act of Parliament (*i*).

608. The ultimate court of appeal, in all matters where appeal was permissible, was represented originally by the Sovereign, as

The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 99, provided that Durham and Lancaster were to cease to be counties palatine with respect to the issue of commissions of assize or other like commissions, but not further or otherwise, and the practice as to such commissions was assimilated to that of the other counties in England and Wales. This provision has been taken, it seems, not to apply to commissions of the peace in Lancaster, and justices of the peace therein are still appointed by the Chancellor of the Duchy under the palatine seal on the recommendation of the lord lieutenant, whilst legal patronage is exercised by the Chancellor of the Duchy, except as to the appointment of recorders and grants of quarter sessions (as to county court judges in Lancaster, see County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 8, 15). The jurisdiction of the Court of Appeal in Chancery of Lancaster was transferred to the Court of Appeal, and that of the Courts of Common Pleas in Lancaster and Durham to the High Court of Justice by the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 18. The *teste* to writs etc. in Durham and Lancaster is now made in the name of the Crown. The earldom and county palatine of Chester were united to the Crown by Henry III., and thence is derived the title of the King's eldest son as Earl of Chester (1 Bl. Com., 14th ed., 117, and see p. 368, *ante*. As to the appointment of officers in Chester on the demise of the Crown, see p. 384, *ante*). The jurisdiction of the Chester palatine courts was abolished by the Law Terms Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 70), s. 14 (since repealed), with a saving of the obligations, duties, jurisdictions, and rights of the mayor and citizens of Chester in the courts of the county of the city of Chester or otherwise, except as to writs of error or false judgment theretofore brought from such courts by charter or usage before the palatine courts, which are now to be issued as from other inferior courts and returnable in the King's Bench Division (*ibid.*, s. 15). As to the oaths formerly taken in the palatine courts of Chester, and which are now to be taken at the assizes or quarter sessions, see *ibid.*, s. 32. As to the levying of fines in Chester and the transmission of the roll containing the names of persons made liable during the preceding assizes, see *ibid.*, s. 33. The Isle of Ely was not, it seems, a county palatine, but a royal franchise, the bishops having been granted full *jura regalia* and jurisdiction over all causes criminal and civil within the island by Henry I. (1 Bl. Com., 14th ed., 119; 4 Co. Inst. 220). The assizes and other civil and criminal commissions in the county of Cambridge, including the Isle of Ely, are now held as directed by Order in Council under the Liberties Act, 1836 (6 & 7 Will. 4, c. 87), s. 8; Assizes Act, 1833 (3 & 4 Will. 4, c. 71). The custos rotulorum and the chief bailiff of the Isle of Ely are now appointed by the Crown (Liberties Act, 1836 (6 & 7 Will. 4, c. 87), ss. 7, 12). In construing statutes the Isle of Ely is to be deemed and taken to be a division of a county (Liberty of Ely Act, 1837 (7 Will. 4 & 1 Vict. c. 53), s. 7). The gaol at Ely is abolished, and prisoners are to be committed to or confined in the gaol at Cambridge, but the houses of correction at Ely were directed to remain and their keepers to be continued in office during the pleasure of the justices of the peace for the island and to be appointed by the said justices as in other counties (Liberties Act, 1836 (6 & 7 Will. 4, c. 87), ss. 13, 14). Persons committed from the Isle of Ely and convicted may be imprisoned either in the Cambridge gaol at Chesterton or the house of correction at Ely or Wisbech, or elsewhere in the Isle of Ely (Liberty of Ely Act, 1837 (7 Will. 4 & 1 Vict. c. 53), ss. 1, 2). As to expenses in connection with prisoners in the island, see *ibid.*, ss. 3, 4. Justices in Ely have the same powers as other justices, and the powers of the justices of Cambridge and of Ely are mutual (*ibid.*, ss. 5, 6). The regulations respecting juries and jurors for counties in England apply to the Isle of Ely and to the rest of the county of Cambridge, and jurors in Ely are to be summoned by the sheriff of Cambridge and Huntingdon. Persons residing in the Isle of Ely are liable to serve on juries for the county of Cambridge as other persons residing in the said county (Liberties Act, 1836 (6 & 7 Will. 4, c. 87), s. 15).

(*i*) See p. 485, *post*.

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being the source and fountain of justice (*j*), and to the King in Council, represented since 1833 by the Judicial Committee of the Privy Council (*k*), appeals still lie from the colonial and ecclesiastical courts, and in prize causes, as also from the colonial admiralty and vice-admiralty courts (*l*).

Judicial Committee of Privy Council.

Where a right of appeal to the King in Council exists, such right is not negatived by a mere grant of sovereignty containing no reservation of the right (*m*), though it may be barred by express words contained in a charter of justice (*n*) or statute (*o*).

Establishment of courts.

609. As the source and fountain of justice the Crown may issue such commissions to administer the law as are warranted by the common or statute law (*p*). But it may not, without statutory authority, establish courts to administer any but the common law (*q*); and it may not, it is said, grant the right to hold a court of equity (*r*). The Crown may not issue commissions in time of peace to try civilians by martial law (*s*); but when a state of actual war, or of insurrection, riot, or rebellion amounting to war, exists (*t*)

(*j*) Thus, the present jurisdiction of the House of Lords may be traced back to the appellate jurisdiction of the King in Council in Parliament. The House of Lords became recognised as the ultimate court of appeal from the King's Bench and Exchequer probably by the time of Henry IV. (Rot. Parl. 1 Hen. 4, No. 79; compare *ibid.* 50 Edw. 3, No. 40, and see Carter, Hist. Eng. Leg. Inst., 3rd ed., p. 103).

(*k*) See the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41); the Privy Council Appeals Act, 1832 (2 & 3 Will. 4, c. 92), ecclesiastical appeals; the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), appeals from colonial admiralty courts; and titles ADMIRALTY, Vol. I., at p. 140; COURTS.

(*l*) As to appeals from colonial courts, see p. 426, *post*, and titles COURTS; DEPENDENCIES AND COLONIES. As to appeals generally, see title COURTS.

(*m*) *Christian* v. *Corren* (1716), 1 P. Wms. 329, 330, relating to the grant of the sovereignty of the Isle of Man. The Crown may no longer create a sovereign in any part of the British dominions. See p. 455, *post*.

(*n*) *R.* v. *Alloo Paroo* (1847), 5 Moo. P. C. C. 296.

(*o*) A statute providing that the judgment of a colonial court is final is not sufficient by itself to bar the Crown's right of granting special leave to appeal. See *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, overruling *Cuvillier* v. *Aylwin* (1832), 2 Knapp, 72, P. C. See also p. 427, *post*, and titles COURTS; DEPENDENCIES AND COLONIES.

(*p*) Com. Dig. Prerog. D, 29.

(*q*) *Ibid.*, D, 28; 4 Co. Inst. 200. See also p. 379, *ante*, as to illegal courts.

(*r*) Bac. Abr. tit. Prerog. F, 1. Forsyth's Cases and Opinions on Constitutional Law, pp. 172—174. In the counties palatine the right to hold a court of equity passed with the full *jura regalia*, but such franchise cannot, it seems, be created at the present day (see *ibid.*, and p. 400, *ante*).

(*s*) Petition of Right, 1627 (3 Car. 1); *Ex parte Marais*, [1902] A. C. 109, *per* the Earl of HALSBURY, L.C., at p. 115, "the framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." The issue of commissions of martial law has long been discontinued, and the term "martial law" is now generally applied to that state of affairs which exists in time of war, when the Crown by proclamation, or by notice issued by the military authorities, warns the public that certain offences will be tried and punished by court-martial (for the terms of the notice issued in South Africa, see *Ex parte Marais*, *supra*, at p. 113).

(*t*) As to when a state of war will be deemed to exist, see Opinions of Coke and Rolle, cited Rushworth, Historical Collections, part 2, Vol. II., App., pp. 79, 81, "The time of peace is when the Courts of Westminster are open." "If the Chancery and Courts of Westminster be shut up . . . it is time of

Martial law.

the Crown and its officers may use the amount of force necessary in the circumstances to restore order (*a*), and this use of force is sometimes termed martial law (*b*). When once this state of actual war exists (*c*) the civil courts have no authority to call in question the actions of the military authorities (*d*); but the powers of the military authorities cease and those of the civil courts are resumed *ipso facto* with the termination of the disorder (*e*). Whether this power is really a prerogative of the Crown, or whether it is merely an example of the common law right and duty of all—ruler and subject alike—to use the amount of force necessary to suppress disorder (*f*), is not quite free from doubt (*g*).

war, but if the Courts be open it is otherwise; yet if war be in any part of the kingdom that the sheriff cannot execute the king's writ, then is *tempus belli*" (1 Hale, P. C. 344, and Hale, History of the Common Law, pp. 42, 43; Co. Litt. 249 a b.).

(*a*) *Case of Shipmoney* (1637), 3 State Tr. 826, at 976 (Holborne's argument), and at 1162, *per* CROOKE, J.; *R.* v. *Nelson and Brand* (1867), Frederick Cockburn's Report, at p. 85; Forsyth, Cases and Opinions on Constitutional Law, pp. 198, 199.

(*b*) Forsyth, Cases and Opinions on Constitutional Law, pp. 198, 199, 556, 557.

(*c*) The fact that for some purposes the civil tribunals have been permitted by the military authorities to pursue their ordinary course is not conclusive that war is not raging (*Ex parte Marais*, [1902] A. C. 109, *per* the Earl of HALSBURY, L.C., at p. 114; see also *Elphinstone* v. *Bedreechund* (1830), 1 Knapp, 316, P. C.).

(*d*) *Ex parte Marais*, *supra*, at p. 115; *Elphinstone* v. *Bedreechund*, *supra*. It is doubtful how far sentences of fine and imprisonment passed by courts-martial upon civilians would be valid in law after the war or insurrection is over. It is usual to confirm such sentences by statute (see Forsyth, Cases and Opinions on Constitutional Law, p. 211). The sentences passed during the South African war were confirmed by the Cape of Good Hope Acts No. 6 of 1900 and No. 4 of 1902. A commission subsequently sat under statutory powers (see Cape of Good Hope Act No. 4 of 1902, s. 5 (1)) to reduce or remit such sentences.

(*e*) See *Wolfe Tone's Case* (1798), 27 State Tr. 613, 625.

(*f*) As to this see *R.* v. *Pinney* (1832), 3 B. & Ad. 947; and Lord Bowen's report on the Featherstone riots, Parliamentary Reports, 1893–94, cd. 7234.

(*g*) See the remarks of BLACKBURN, J., in *R.* v. *Eyre* (1868), Finlason's Report, at p. 74. In favour of the view that the power to proclaim martial law in proper circumstances exists as a prerogative of the Crown there may be cited the clauses of certain statutes authorising the exercise of martial law in Ireland, which save the right of the Crown "for the public safety to resort to the exercise of martial law against open enemies and traitors" (see 37 Geo. 3, c. 11, s. 6 (Irish); 43 Geo. 3, c. 117 (repealed); 3 & 4 Will. 4, c. 4, s. 40 (repealed)). In favour of the opposing view there may be cited *R.* v. *Nelson and Brand* (1867), Frederick Cockburn's Report, 59, 74; *Grant* v. *Gould* (1792), 2 Hy. Bl. 69, 98; *R.* v. *Eyre*, *supra*, *per* BLACKBURN, J., at pp. 73, 74; Forsyth, Cases and Opinions on Constitutional Law, pp. 198, 199, 553, 556, 557. There does not seem to be much practical difference in the consequences of holding one view or the other. On either view the powers of the Crown and its officials are limited both as to their extent and their duration by the necessity of the case. It is customary for Parliament to pass Acts of indemnity after the occasion is over, perhaps because the existence of the prerogative is doubtful, and certainly because it is necessary to protect persons who have acted *bonâ fide* in a time of war or insurrection (for examples of such Acts, see the Cape of Good Hope Acts, No. 6 of 1900, No. 4 of 1902). Such Acts are not generally so drawn as to protect persons who have acted *malâ fide* and without due regard to humanity (see Forsyth, Cases and Opinions on Constitutional Law, 551; *Wright* v. *Fitzgerald* (1799), 27 State Tr. 765). The term martial law is also used to express the powers exercisable by the general in command of an army in a hostile land over the inhabitants thereof; and it is this species of martial law which the Duke of Wellington had in his mind when he described it as the will of the general

SECT. 5. The Crown in Relation to the Law.

Colonial courts.

610. The Crown also enjoys certain powers of constituting courts and officers, and of regulating their procedure and jurisdiction, in settled, conquered, and ceded colonies, in so far as such powers have not been restricted by statute or by the grant of representative institutions (*h*); and in British protectorates and various foreign countries the jurisdiction acquired by the Crown, by treaty, usage, sufferance, and other lawful means, is recognised and regulated by Act of Parliament (*i*).

SUB-SECT. 2.—*Pardons and Reprieves.*

Pardons.

611. The Crown enjoys the exclusive and inseparable right of granting pardons, and this privilege cannot be claimed by any other person either by grant or prescription (*k*), though it is usually delegated to colonial governors (*l*).

Pardon may, in general, be granted either before or after conviction (*m*). But no pardon is pleadable in bar of an impeachment by the Commons (*n*), and the penalty of a *præmunire* imposed by statute for committing to prison out of the realm cannot be remitted (*o*).

The right of pardon is, moreover, confined to offences of a public nature where the Crown is prosecutor and has some vested interest either in fact or by implication (*p*); and where any right or benefit is vested in a subject by statute or otherwise, the Crown, by a pardon, cannot affect it or take it away (*q*).

Nature of pardon.

612. Pardons may be either free or conditional, the latter being usually granted where a death sentence is commuted (*r*). Formerly

in command of the army. But martial law in this sense is quite outside the range of municipal law—"Martial law must be distinguished according as it is a foreign or international fact or as it is a domestic or municipal fact" (Mr. Cushing, Attorney-General of the U.S.A., Opinions of Attorneys-General, Vol. VIII., at p. 369). From martial law "military law" must be carefully distinguished; as to military law, see title ROYAL FORCES.

(*h*) See p. 426, *post*; and titles COURTS; DEPENDENCIES AND COLONIES.

(*i*) See p. 448, *post*.

(*k*) 27 Hen. 8, c. 28, s. 1; and see 3 Co. Inst. 233.

(*l*) See title DEPENDENCIES AND COLONIES.

(*m*) 3 Co. Inst. 233; and see *R.* v. *Boyes* (1861), 1 B. & S. 311. If granted before conviction it must be specially pleaded (*R.* v. *Boyes*, *supra*).

(*n*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3. This provision does not negative the Crown's right of pardoning after impeachment. Thus, three of the lords impeached and attainted in 1715 were subsequently pardoned. The principle of excluding a pardon as a bar to an impeachment by the Commons was first affirmed in the case of the Earl of Danby by a resolution of the House of Commons (see Commons' Journal, 5th May, 1679).

(*o*) Habeas Corpus Act, 1679 (31 Car. 2, c. 2), s. 12.

(*p*) 3 Co. Inst. 235—240.

(*q*) *Biggin's Case* (1599), 5 Co. Rep. 50 a, b; *Hall's Case* (1604), 5 Co. Rep. 51 a. So the Crown may not pardon the commission of a public nuisance before conviction whilst it continues (Bac. Abr. tit. Pardon, B); nor release a recognisance to keep the peace, nor discharge an action so as to deprive a common informer of the penalty (3 Co. Inst. 238), the maxim of law applicable in all such cases being *Non potest rex gratiam facere cum injuriâ et damno aliorum* (3 Co. Inst. 236). But as to the power of the Crown to remit penalties in certain cases, even though payable to a private person, see note (*c*), p. 407, *post*.

(*r*) The condition in such a case is the endurance of the substituted penalty. On a conviction of any crime punishable with death in England and Wales.

they were in all cases required to pass under the Great Seal (*s*), but on conviction of any felony punishable with death or otherwise a sign manual warrant, countersigned by a principal Secretary of State, has now, on the discharge of the offender out of custody, or on the performance of the condition in the case of free and conditional pardons respectively, the same effect as a pardon under the Great Seal as to the felony for which it is granted (*t*). In cases of murder, death by assault, treason, or rape, the pardon must specify the offence, otherwise it will be ineffectual (*u*).

How granted.

613. A pardon is usually granted on the advice of the Home Secretary (*x*), to whose notice the matter is brought either on a recommendation to mercy by the judge when passing sentence (*y*), or on petition by the criminal himself or his friends on his behalf (*a*).

On the consideration of any petition for pardon having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted after the 18th day of April, 1908, the Home Secretary (*b*) is empowered (*c*), if he thinks fit, at any time either to refer the whole case to the Court of Criminal Appeal (*d*), when the case must be heard and determined by that court, as in the case of an appeal by a convicted person, or to refer any point arising in the case, with a view to the determination of the petition, to that court for their

where the intention of His Majesty's mercy on condition of imprisonment with or without hard labour is signified by a principal Secretary of State to the court before whom the offender is convicted, or any subsequent court, with the like authority, such court is to allow to the offender the benefit of a conditional pardon and make an order for the imprisonment of the offender with or without hard labour as the case may be. The intimation may be made to the judge or justice before whom the offender has been convicted or to any judge of the King's Bench Division, and if so made is to have the same effect as if signified to the court during the term or session at which the offender was convicted, and the allowance of the pardon and the order for imprisonment is to be entered on the records of the court by the proper officer, and to have the same effect and consequences as if made by such court during the continuance of the term or session (Transportation Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 39), s. 7). This provision extends to pardons granted by His Majesty or the Lord Lieutenant of Ireland, conditional on penal servitude for any term of years or for life (Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), s. 5).

(*s*) *Bullock* v. *Dodds* (1819), 2 B. & Ald. 258, 277; *Gough* v. *Davies* (1856), 2 K. & J. 623; 4 Bl. Com., 14th ed., 400.

(*t*) Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28), s. 13; as to Ireland, Criminal Law (Ireland) Act, 1828 (9 Geo. 4, c. 54), s. 33.

(*u*) 13 Ric. 2, stat. 2, c. 1.

(*x*) As to the manner in which petitions are dealt with by the Home Office, see report of the committee of inquiry into the case of Adolf Beck, Parliamentary Paper, Cd. 2315, J 1904.

(*y*) *R.* v. *Oxford County* (*Inhabitants*) (1811), 13 East, 411, at p. 416, note (b).

(*a*) This right to petition cannot be denied, having been expressly confirmed by the Bill of Rights, 1688 (1 Will. & Mar., sess. 2, c. 2); see p. 383, *ante*.

(*b*) The expression "Secretary of State" is used in the Act. As to the performance of the duties of a Secretary of State by one or any of them, see Vol. VII., Part VI., sect. 6.

(*c*) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), ss. 19, 23.

(*d*) As to the Court of Criminal Appeal generally, see title COURTS. As to the practice and procedure on criminal appeal, see title CRIMINAL LAW AND PROCEDURE.

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opinion thereon, and the court must consider the point so referred, and furnish the Secretary of State with their opinion thereon accordingly (*e*).

This provision does not extend to Scotland or Ireland (*f*), nor is the prerogative of mercy affected by it (*g*).

No fee for pardon.

614. No fee, gratuity, or other due is payable in respect of any grant of a pardon, or in respect of instruments (*h*) appertaining thereto or the transcript of any such instrument, but all fees which were on the 23rd May, 1818, paid and payable for the granting and passing of pardons are to be paid by the Treasury (*i*). No stamp duty is payable in respect of any such instrument (*k*).

Effect of pardon.

615. The effect of a pardon under the Great Seal is to clear the person from all infamy, and from all consequences of the offence for which it is granted (*l*), and from all statutory or other disqualifications following upon conviction (*m*). It makes him, as it were, a new man, so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence for which he was convicted (*n*), and, in the days when crime disqualified a man from being a witness, removed the disqualification (*o*).

But in cases where a free or conditional pardon is granted for any felony, the offender's discharge or performance of the condition in the case of a free or conditional pardon respectively, is not to prevent or mitigate the punishment which might otherwise be lawfully inflicted on a subsequent conviction for any felony committed after the granting of the pardon (*p*).

Where a clergyman is convicted or found guilty of certain offences, or where an order is made against him in relation thereto (*q*), and

(*e*) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), ss. 19, 23.

(*f*) *Ibid.*, s. 23 (2).

(*g*) *Ibid.*, s. 19.

(*h*) The instruments specially mentioned are letters patent, charter, warrant, bill, docket, or other instrument.

(*i*) Fees for Pardons Act, 1818 (58 Geo. 3, c. 29), s. 1. The expenses are to be paid by the same persons as pay other law expenses on behalf of His Majesty (*ibid.*).

(*k*) *Ibid.*, s. 2.

(*l*) Bac. Abr. tit. Pardon, H.; *Hay* v. *Tower Division* (*London*) *Justices* (1890), 24 Q. B. D. 561, 565; 2 Hale, P. C. 278. The effect is confined to the offence for which it was granted (see *R.* v. *Harrod* (1846), 2 Car. & Kir. 294).

(*m*) *Hay* v. *Tower Division* (*London*) *Justices*, *supra*; *Bennet* v. *Easedale* (1626), Cro. Car. 55.

(*n*) *Cuddington* v. *Wilkins* (1615), Hob. 67, 81; 2 Hawk. P. C., 1824 ed., p. 547; and compare *Leyman* v. *Latimer* (1877), 3 Ex. D. 15.

(*o*) *Fine's* (*Sir Henry*) *Case* (1623), Godb. 288; *R.* v. *Gully* (1773), 1 Leach, 98, 99; 2 Hawk. P. C., 1824 ed., 547. The disqualification was removed in all cases by the Evidence Act, 1843 (6 & 7 Vict. c. 85). As to the equitable right of an accomplice who turns King's evidence to a pardon, see *R.* v. *Rudd* (1775), 1 Leach, 115, 121, 125. As to the effect of a pardon on forfeiture for outlawry, see *Re Harrington's Trusts* (1860), 29 Beav. 24; *Re Church's Will* (1851), 16 Jur. 517; *Newsome* v. *Bowyer* (1729), 3 P. Wms. 37. As to the effect of a reversal of outlawry on forfeiture, see *Peyton* v. *Ayliff* (1693), 2 Vern. 312.

(*p*) Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28), s. 13; as to Ireland, Criminal Law (Ireland) Act, 1828 (9 Geo. 4, c. 54), s. 33.

(*q*) The offences mentioned in the Act are:—(1) Conviction of treason or felony, or on indictment of a misdemeanour, where sentence of imprisonment

receives a free pardon, his incapacity to hold preferment (*r*) is to cease, and if he receives the pardon before the institution of another clergyman to the preferment formerly held by him, the bishop must, within twenty-one days after receiving notice in writing of the pardon, again institute him, and cause him to be inducted into the preferment, no fee being payable to any person in respect thereof (*s*).

Effect of endurance of punishment.

The endurance of the punishment on conviction for any felony not capital has the like effect and consequences as a pardon under the Great Seal with respect to the felony, except as to the effect of the conviction upon the punishment which might otherwise lawfully be inflicted on a subsequent conviction for any other felony (*t*).

Proclamations promising pardon.

616. A proclamation promising pardon has not the legal effect of a pardon, but in such cases the court will defer execution of sentence, and so allow time for the prisoner to apply for a pardon (*a*).

Reprieves.

617. The Crown may also exercise the prerogative right of granting reprieves, which is effected by announcing its pleasure in any way to the court (*b*), and may remit penalties in certain cases (*c*).

with hard labour or any greater punishment is passed; (2) order under the Acts relating to bastardy, or for judicial separation in a divorce or matrimonial cause, or for separation under the Matrimonial Causes Act, 1878; (3) where a clergyman is found in a divorce or matrimonial cause to have committed adultery (Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 1 (1)).

(*r*) The preferment held by him in the cases mentioned in the last note is to be declared void by the bishop within twenty-one days, and he is to be incapable of holding preferment (*ibid.*). See also title ECCLESIASTICAL LAW.

(*s*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 1 (2). If the bishop fails to comply with this direction within the twenty-one days, it is to be done by or under the authority of the archbishop of the province (*ibid.*, s. 1 (3)).

(*t*) Civil Rights of Convicts Act, 1828 (9 Geo. 4, c. 32), s. 3. But as to the effect of enduring punishment on the removal of statutory disqualifications, see *R.* v. *Vine* (1875), L. R. 10 Q. B. 195, and *Leyman* v. *Latimer* (1877), 3 Ex. D. 15; as to the effect of enduring punishment on forfeiture, see *Stokes* v. *Holden* (1836), 1 Keen, 145.

(*a*) *R.* v. *Garside* (1834), 2 Ad. & El. 266. As to the cases in which a person is legally entitled to pardon, see *R.* v. *Rudd* (1775), 1 Leach, 115; 2 Hawk. P. C., c. 37.

(*b*) 2 Hale, P. C. 412. Reprieves may also be granted by the judge on his own initiative (*ibid.*).

(*c*) Under the Remission of Penalties Act, 1859 (22 Vict. c. 32), s. 1, His Majesty (or, in Ireland, the Lord Lieutenant) may remit in whole or in part any sum of money imposed under any Act as a penalty or forfeiture on a convicted offender, although such money is payable in whole or in part to some party other than the Crown. Imprisonment for non-payment of any sum of money so imposed may also be remitted, although such money may be payable in whole or in part to some party other than the Crown. Under the Remission of Penalties Act, 1875 (38 & 39 Vict. c. 80), s. 1, any penalty, fine, or forfeiture imposed or recovered for any offence under the Sunday Observance Act, 1780 (21 Geo. 3, c. 49), whether on indictment, information, or summary conviction, or by action, or any other process, may be remitted in whole or in part. Remission of penalties under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 109; and the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 67, imposed on summary conviction under the Acts, releases the person so convicted from all further or other proceedings for the same cause. As to the circumstances under which the Remission of Penalties Acts apply, see *Todd* v. *Robinson* (1884),

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SUB-SECT. 3.—*Gaols and Prisons.*

Gaols and prisons.

618. The Sovereign is vested with the property in all gaols and prisons (*d*), of which he is governor at common law and of which he could formerly grant the custody by way of franchise (*e*). The custody of gaols, having been vested in the sheriffs (*f*), may no longer be granted to private persons (*g*), nor may a prisoner be detained otherwise than in a common gaol (*h*). New gaols and prisons can now only be created under statutory authority (*i*).

SUB-SECT. 4.—*How far the Crown is bound by Custom.*

Crown not bound by custom.

619. Under the general rule at common law, no custom (*k*) which goes to the person or goods binds the King (*l*), and therefore he is not subject to toll (*m*) or pontage and passage (*n*), nor is his personal property subject to many of the laws which are applicable in the case of the subject (*o*). But certain franchises may be prescribed for against the King (*p*), and certain customs relating to land, such as borough English and gavelkind (*q*), are binding upon the Crown (*r*); and as the King may take advantage of statutes, though not bound (*s*), so also, it seems, he may take advantage of custom.

SUB-SECT. 5.—*General Privileges and Exemptions of the Crown in Legal Proceedings.*

Arrest.

620. The King's person cannot be arrested (*t*); and this privilege extends, in civil suits, to persons of His Majesty's household who are

12 Q. B. D. 530; *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, 374. As to the effect of the remission of a penalty on forfeiture, see *Gough* v. *Davies* (1856), 2 K. & J. 623; see also title CRIMINAL LAW AND PROCEDURE.

(*d*) 2 Co. Inst. 100; Bac. Abr. Gaol, A; and see title PRISONS AND REFORMATORIES.

(*e*) 2 Co. Inst. 43; Bac. Abr. Gaol, C.

(*f*) 5 Hen. 4, c. 10.

(*g*) 2 Roll. Abr. 806; *Mitton's Case* (1584), 4 Co. Rep. 34 a; *Sanchar's (Lord) Case* (1613), 9 Co. Rep. 116 b.

(*h*) *Scavage* v. *Tateham* (1601), Cro. Eliz. 829, 830.

(*i*) 2 Co. Inst. 705; Bac. Abr. tit. Gaol, A. As to gaols and prisons generally, see title PRISONS AND REFORMATORIES.

(*k*) Custom differs from common law as being applicable to particular persons or districts, whilst the latter is universally applicable.

(*l*) Vin. Abr. tit. Prerog. T. (2); *Anon.* (1458), Jenk. 83, "*nullum tempus nec locus occurrit regi*"; therefore the custom of London to hold goods pledged until the loan was repaid did not bind Crown jewels. And see title CUSTOM AND USAGE.

(*m*) Vin. Abr. tit. Prerog. T (2). And see titles HIGHWAYS; MARKETS AND FAIRS.

(*n*) *Ibid.*; *Anon.* (1458), Jenk. 83.

(*o*) *E.g.*, the law as to wreck, estrays, waifs, sale in market overt, distress (see *Anon.*, Jenk. 83, *supra*).

(*p*) See p. 489, *post*.

(*q*) As to these customs, see title REAL PROPERTY AND CHATTELS REAL. When lands in gavelkind descend to the King he takes one moiety and his brother the other; but when the King dies his moiety descends to his eldest son and becomes land held *jure coronæ* (Co. Litt. 15 b). And see p. 494, *post*.

(*r*) Vin. Abr. tit. Prerog. T, 2; *Anon.* (1458), Jenk. 83. But fines payable on alienation of land are, it is said, not payable when the alienation is to the Crown (Vin. Abr. tit. Prerog. T, 2).

(*s*) See p. 409, *post*.

(*t*) 2 Co. Inst. 50.

liable to be *bonâ fide*, substantially, and continually employed in waiting or attending on the royal person (*a*), unless the leave of the Lord Chamberlain of the Household to the arrest be first obtained (*b*).

Where the privilege is clearly established the court will discharge the prisoner on motion; otherwise he must bring a writ of privilege (*c*).

Privilege of royal palaces.

621. On the same principle no arrest can be made in the King's presence or within the verge of the royal palace (*d*), and no judicial process can be executed therein provided some royal appearance be kept up, even though the King is not at the time personally residing there (*e*).

Execution and distress.

Nor can the King's goods be taken in execution (*f*), nor a distress be taken on lands in his possession (*g*); nor may Crown chattels on the land of a subject be taken in execution or for distress (*h*).

Statutes.

622. The Crown is not bound by statute unless expressly named, or bound by necessary implication (*i*); nor do bye-laws made under statutory powers bind the Crown, unless expressly or impliedly authorised to do so (*k*).

The Crown may, however, take advantage of statutes though not named (*l*), unless expressly or impliedly prohibited from doing so (*m*), and this principle probably applies to bye-laws.

(*a*) 2 Co. Inst. 631; 4 *ibid.* 24; *Bartlett* v. *Hebbes* (1794), 5 Term Rep. 686. Continual service and attendance is necessary to afford exemption (2 Co. Inst. 631). The exemption has been held to extend to a junior clerk of the King's kitchen (*Bartlett* v. *Hebbes*, *supra*)—but otherwise, it appears, on outlawry (*ibid.* 687)—and to a coachman in ordinary (*R.* v. *Foster* (1809), 2 Taunt. 167), and to arrest for debt incurred in carrying on a public trade (*ibid.*). But the privilege is confined to servants in ordinary with fee (*Luntley* v. *Battine* (1818), 2 B. & Ald. 234, *per* ABBOTT, C.J., at p. 237, and see *ibid.*, pp. 238, 239, note (b)), and does not extend to a nominal officer without fee on a particular occasion (*Luntley* v. *Battine*, *supra*, at pp. 237, 238), or, *semble*, to gentlemen of the privy chamber (*Barrington* v. *Venables* (1661), 1 Keb. 137, where the court inquired who the counsel was who had pleaded the privilege in order to punish him; but see *contrà*, *Luntley* v. *Battine*, *supra*, at pp. 238, 240; *R.* v. *Moulton* (1666), 2 Keb. 3). Actual residence by the King at the time within the palace is not necessary (*Winter* v. *Miles* (1809), 10 East, 578).

(*b*) See the cases cited in the last note, and Chitty, Prerogatives of the Crown, p. 374.

(*c*) *Luntley* v. *Battine*, *supra*.

(*d*) 3 Bl. Com. 289. An arrest within the verge is not a good ground for discharging the prisoner out of custody (*Sparks* v. *Spink* (1817), 7 Taunt. 311). By stat. 28 Hen. 8, c. 12, the verge of the palace of Westminster extends from Charing Cross to Westminster Hall.

(*e*) *Winter* v. *Miles* (1809), 10 East, 578.

(*f*) Chitty, Prerogatives of the Crown, p. 376. As to the remedy by petition of right, see title CROWN PRACTICE.

(*g*) *Willion* v. *Berkley* (1561), Plowd. 223; *Anon.* (1459), Jenk. 112.

(*h*) *Secretary of State for War* v. *Wynne*, [1905] 2 K. B. 845. This privilege extends even after distraint and sale, and in a proper case, damages may, it seems, be recovered (*ibid.*). See also title LANDLORD AND TENANT.

(*i*) *Magdalen College Case* (1615), 11 Co. Rep. 66 b, 68 b; 1 Bl. Com. 14th ed., 262; *Sheffeild* (*Lord*) v. *Ratcliffe* (1615), Hob. 334, 347. See also title STATUTES.

(*k*) See note (*g*), p. 374, *ante*.

(*l*) *Magdalen College Case*, *supra* (whether the statute be negative or affirmative); *Willion* v. *Berkley*, *supra*, at p. 243; *R.* v. *Buckberd* (1594), 1 Leon. 149; *A.-G. for New South Wales* v. *Curator of Intestates Estates*, [1907] A. C. 519, P. C. (colonial Act); *R.* v. *Cruise* (1852), 2 I. Ch. R. 65; *A.-G.* v. *Tomline* (1880), 15 Ch. D. 150, C. A. See also title STATUTES.

(*m*) *R.* v. *Cruise*, *supra*.

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623. The King may not, it is said, give evidence in his own cause (*n*), hence he cannot do so in treason or felony (*o*); whether his evidence under the sign manual or Great Seal is admissible as to facts within his knowledge has been doubted (*p*).

The Crown is not bound by fictions of law (*q*) or by estoppels (*r*). But the Crown may possibly take advantage of the latter (*s*), though not, it seems, where the estoppel arises through its own letters patent (*t*).

The Crown is not, it is said, bound to offer an acquittance or receipt, but the subject in discharging a debt ought himself to bring an acquittance and demand it of the King (*u*).

Laches.

624. In consequence of the legal attribute of perfection (*w*), negligence or *laches* will not, in general, bar the Sovereign's right of action (*x*), whether the negligence be due to himself or to his officers, the maxim being that no time runs against the King (*y*).

Prescription.

Nor do the Prescription Acts bind the Crown, except where expressly named (*a*). But liberties and franchises may be prescribed for at common law (*b*); and in suits relating to land (except liberties and franchises) the Crown is barred, as a rule, by the lapse of sixty years (*c*). In the case of treason and misprision of treason

(*n*) 2 Hale, P. C. 282; Chitty, Prerogatives of the Crown, p. 377.

(*o*) 2 Hale, P. C. 282.

(*p*) 2 Roll. Abr. tit. Trials, Testimonies, H. But such evidence has been admitted. See *Abignye* (*Lord*) v. *Clifton* (*Lord*) (*circa* 1611), Hob. 213, as to certificate under sign manual; *Lea's* (*Sir Henry*) *Case* (1612), Godb. 198, 199. There is authority to the effect that such evidence may be received in civil cases between third parties. See Chitty, Prerogatives of the Crown, p. 378, note (d).

(*q*) *Anon.* (1613), Jenk. 287.

(*r*) *Coke's* (*Sir Edward*) *Case* (1622), Godb. 289, 299. This applies even to estoppels affecting the party through whom the Crown claims. (Staundford, Prærog. Regis, 64 a; *Coke's* (*Sir Edward*) *Case*, *supra*, at p. 291, release of debt by King's debtor.)

(*s*) Co. Litt. 352 a, b.

(*t*) Thus, a subject is not estopped, it is said, if he takes a lease of his own lands rendering rent by letters patent from the King, because the King is not estopped by his letters patent, and any estoppel ought to be of both parties (see Vin. Abr. tit. Estoppel, N, 3). But where the King grants lands by letters patent to a person who is in fact seised by inheritance, the latter is, it seems, estopped from claiming any other right than by the letters patent, if the right by inheritance is not recited therein (*ibid.*, N, 16).

(*u*) Vin. Abr. tit. Prerog. T (2) 13; Bro. Abr. Prerog. pl. 101; 2 Co. Inst. 281.

(*w*) See p. 374, *ante*.

(*x*) Com. Dig. tit. Prerog. D, 86; *Willion* v. *Berkley* (1561), Plowd. 223, 243; *Coke's* (*Sir Edward*) *Case*, *supra*, at p. 297; and see p. 374, *ante*, and title LIMITATION OF ACTIONS.

(*y*) Co. Litt. 90 b, 119 a; and see the references in note (*x*), *supra*.

(*a*) *Perry* v. *Eames*, [1891] 1 Ch. 658, approved in *Wheaton* v. *Maple*, [1893] 3 Ch. 48, C. A., where it was held that the Crown, not being named, is not bound by the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3, as to ancient lights, though named in and therefore bound by ss. 1 and 2 of the same Act relating to rights of common, *profits à prendre*, ways, use of water or water-courses, or other easements. See also p. 483, *post*.

(*b*) See pp. 483, 490, *post*.

(*c*) Nullum Tempus Act, 1769 (9 Geo. 3, c. 16), s. 1. Notwithstanding such lands may have been in charge to the Crown or have stood *insuper* of record (Crown Suits Limitation Act, 1861 (24 & 25 Vict. c. 62), s. 1); actions for

no proceeding lies in England and Wales, unless the indictment be found within three years of the offence committed (*d*).

In certain cases, also, the Crown's right of action fails through determination of the right itself (*e*).

Choice of forum.

625. The Crown may in general choose its own forum and sue in what court it pleases (*f*); and though special modes of redress against the subject by means of informations, inquisitions or inquests of office, extents, *scire facias*, *quo warranto*, and mandamus are provided by law (*g*), the Crown may usually waive these prerogative remedies and resort to the usual forms of action (*h*), unless they are inconsistent with the royal dignity (*i*).

Proceedings by Government departments.

626. Government officials or departments are frequently expressly empowered by statute to sue in the ordinary way, but in such cases the right of the Crown to resort to its prerogative remedies is generally expressly preserved, and whether this be so or not, the Crown may, it seems, adopt the prerogative procedure in preference to the statutory remedy (*j*).

Suits affecting the Crown.

627. In suits between third parties the Attorney-General should be made a party where rights of the Crown are or may be called in question (*k*); but where this has not been done, and the Crown's title is clearly proved, the court may give judgment *ex officio* for the Crown (*l*).

quit rent, or other perpetual rent, or arrears in Ireland are barred by lapse of sixty years (Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 9; see also title LIMITATION OF ACTIONS). Suits relating to lands in Cornwall are in general barred by the land in lapse of sixty years (see Duchy of Cornwall Acts, 1844 and 1860 (7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53); Crown Suits Limitation Act, 1861 (24 & 25 Vict. c. 62), ss. 2, 4; and title LIMITATION OF ACTIONS). As to suits against the Heir Apparent, see note (*n*), p. 369, *ante*. As to Cornwall, see Vol. VII., Part VII., sect. 4.

(*d*) See p. 353, *ante*; and title CRIMINAL LAW AND PROCEDURE as to limitations in criminal suits generally.

(*e*) *E.g.*, tenant for life dying after forfeiture, and before seizure by the Crown; wrongful presentation to a benefice and death of the incumbent before the Crown exercises its right (Co. Litt. 119 a, note (1)).

(*f*) 4 Co. Inst. 17; 1 Bl. Com., 14th ed., 257; *Willion* v. *Berkley* (1561), Plowd. 223, 243; Chitty, Prerogatives of the Crown, pp. 244, 245. Since the amalgamation of the various courts of common law into the King's Bench Division under the Judicature Acts the benefit of such a choice is much diminished.

(*g*) As to these remedies, see title CROWN PRACTICE.

(*h*) Vin. Abr. tit. Prerog. Q; Bro. Abr. tit. Prerog. pl. 130; 1 Roll. Abr. 373; Chitty, Prerogatives of the Crown, p. 245.

(*i*) *E.g.*, action of ejectment, which is contrary to the legal fiction that the Crown can never be dispossessed (Bro. Abr. tit. Prerog. pl. 89; Staundford, Prærog. 56 b; 1 Bl. Com., 14th ed., 257.

(*j*) For an unreported case where the Crown proceeded by information when an action might have been brought by the Secretary of State for War, see Robertson, Civil Proceedings by and against the Crown, p. 2.

(*k*) *Hovenden* v. *Annesley (Lord)* (1805-6), 2 Sch. & Lef. 607, 617, 618; *A.-G.* v. *Norstedt* (1816), 3 Price, 97. But unless the Attorney-General enters a *nolle prosequi*, or proceeds with the suit when served, judgment will go in his absence (Bac. Abr. tit. Prerog. E, 7); *sed quære*; see note (*p*) on p. 399, *ante*.

(*l*) Bac. Abr. Prerog. E, 7; Chitty, Prerogatives of the Crown, p. 244.

SECT. 5. The Crown in Relation to the Law.

Trial at bar.

628. Though invariably represented in court by the Attorney or Solicitor General, who appear on behalf of the Crown, the Crown is not said to appear by them (*m*).

629. Where the Crown is interested in a suit it is entitled to demand a trial at bar as of right (*n*), which must be granted on motion by the Attorney-General, the order being absolute in the first instance (*o*).

General rule as to costs.

630. Apart from statutory provisions, the general rule at common law is that neither the Sovereign, nor any person suing to his use, pays or receives costs (*p*). The common law rule is, however, subject to important modifications (*q*), and the statutory provisions with regard to payment of costs to or by the Crown are numerous (*r*). It would also seem that even where the Crown is not named in, and therefore not bound (*s*) by, any particular statutory provision relating to costs, it may take advantage of the same, if it chooses to do so, under the general rule which permits the Crown to take advantage of any statute though not named (*t*); and the same principle (so far as it exists) would, perhaps, be applicable to the common law, or customary, rules relating to costs (*u*).

SUB-SECT. 6.—*Legal Proceedings against the Crown and its Servants.*

No action lies against the Sovereign.

631. Under the general rule at common law, no proceeding, civil or criminal, is maintainable against the Sovereign in person (*v*), for the

(*m*) 1 Bl. Com., 14th ed., 269. Since in legal contemplation the King's Majesty is always present in court (see p. 399, *ante*).

(*n*) Bac. Abr. Prerog. E, 7.

(*o*) Crown Office Rules, 1906, r. 151. In the case of the subject the motion must be for an order *nisi* (*ibid.*). See also *Rowe* v. *Brenton* (1828), Concanen's Report, pp. xxxvii.—xliii.

(*p*) 2 Bl. Com., 14th ed., 400; *Johnson* v. *R.*, [1904] A. C. 817, *per* Lord MACNAGHTEN, at p. 824; see also *R.* v. *Canterbury* (*Archbishop*), [1903] 1 K. B. 289. See, generally, titles CROWN PRACTICE; PRACTICE AND PROCEDURE; SOLICITORS.

(*q*) *E.g.*, proceedings in Chancery, where the general rule appears to be modified to the extent that the Attorney-General never receives costs in a contest in which he could have been called upon to pay them had he been a private individual (*A.-G.* v. *London Corporation* (1850), 2 Mac. & G. 247). See prior to this case *A.-G.* v. *Ashburnham* (*Earl*) (1823), 1 Sim. & St. 394, *per* LEACH, V.-C., at p. 397: "I find no such general principle in courts of equity." This principle was followed in *A.-G.* v. *London Corporation* (1849), 12 Beav. 171, *per* Lord LANGDALE, M.R., at p. 178, but modified on appeal as above. In Chancery suits the Attorney-General frequently receives costs; see *Moggridge* v. *Thackwell* (1803), 7 Ves. 36, 88 (Attorney-General defendant in respect of a charity); see also *Kane* v. *Reynolds* (1854), 2 Sm. & G. 331, affirmed 4 De G. M. & G. 565; and, generally, Robertson, Civil Proceedings by and against the Crown, pp. 621 *et seq.* See also title PRACTICE AND PROCEDURE.

(*r*) *E.g.*, the Crown Suits Act, 1855 (18 & 19 Vict. c. 90), ss. 1, 2; and the Petition of Right Act, 1860 (23 & 24 Vict. c. 34), ss. 11, 12, as to which see Yearly Practice, 1909, Vol. I., pp. 932, 933; Vol. II., pp. 1343, 1361; and title CROWN PRACTICE.

(*s*) See p. 409, *ante*.

(*t*) See p. 409, *ante*.

(*u*) The Crown may take advantage of custom; see p. 408.

(*v*) *Saddlers'* (*Warden and Commonalty*) *Case* (1587), 4 Co. Rep. 55 a; Bac. Abr. tit. Prerog. E, 1; *ibid.*, tit. Actions B; 1 Bl. Com., 14th ed., 245. See title ACTION, Vol. I., p. 17, note (*k*).

maxim of law is that "the King can do no wrong" (*w*), and the law supplies no remedy where there is no right (*x*).

In civil cases, however, arising out of contract, or relating to real or personal property, otherwise than in tort, a remedy is available against the Crown by petition of right (*y*).

Actions in respect of Crown private estates.

632. In cases relating to statutory private estates of the Crown a remedy by action, which may be brought (*z*) in the ordinary form, is provided against persons specially appointed under the sign manual to represent the Crown (*a*). Special provisions are also made with regard to suits relating to the Duchy of Cornwall, but in the case of the Duchy of Lancaster the common law rules relating to the prerogative in suits and actions are, it seems, applicable, the Crown, however, being represented by the Attorney-General to the Duchy (*b*).

Proceedings against Crown servants.

633. Government departments are the agents of the Executive, and their acts bind the Crown (*c*), but at common law no action (*d*) is in general maintainable against officers and servants of the Crown in their official capacity, either in contract (*e*) or in tort (*f*), and the case would, it seems, be the same in criminal suits; this doctrine applies equally to a Secretary of State as to any other Government official (*g*). Moreover, the public revenues cannot be

(*w*) 1 Bl. Com., 14th ed., 246.

(*x*) Bac. Abr. tit. Actions B, want of remedy and want of right are the same in law. Blackstone also puts it that the law presumes no injury where it has provided no remedy (Bl. Com., *ante*, note (2)). The reason for the privilege has also been ascribed to this supposition that the King by his writ cannot command himself (see *Saddlers' (Warden and Commonalty) Case* (1587), 4 Co. Rep. 54 b, 55 a), though this appears open to doubt. See also title ACTION, Vol. I., p. 10.

(*y*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 2. As to when it lies and the procedure, see title CROWN PRACTICE.

(*z*) Under the Crown Private Estates Acts, see Vol. VII., Part VII., sect. 6.

(*a*) As to proceedings to obtain the benefit of the Trustee Acts with regard to Crown private estates vested in trustees, see the Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 10; as to suits by or against the Crown relating to private estates not vested in trustees and claims against the privy purse, see *ibid.*, s. 11; Crown Private Estates Act, 1873 (36 & 37 Vict. c. 61), s. 3; as to claims against the heir apparent, see note (*n*), p. 369, *ante*.

(*b*) As to suits relating to the Duchy of Cornwall, and as to the Duchy of Lancaster, see Vol. VII., Part VII., sect. 4; and as to the Attorney-General to the Duchy of Lancaster, see Vol. VII., Part VI., sect. 7.

(*c*) See *A.-G.* v. *Lindegren* (1819), 6 Price, 287.

(*d*) Petition of right is directed against the Crown itself and does not lie directly against the subject (see title CROWN PRACTICE). But in a proper case it lies for acts committed by servants of the Crown (see the text, *infra*).

(*e*) *Macbeath* v. *Haldimand* (1786), 1 Term Rep. 172; principle followed in *Gidley* v. *Palmerston* (*Lord*) (1822), 3 Brod. & Bing. 275, and in *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619.

(*f*) *Raleigh* v. *Goschen*, [1898] 1 Ch. 73 (action against the Commissioners of the Admiralty for trespass committed by their servants).

(*g*) *O'Grady* v. *Cardwell* (1872), 20 W. R. 342; *Gidley* v. *Palmerston* (*Lord*), *supra* (action to recover retired allowance). A Secretary of State cannot refuse to appear on the ground of want of jurisdiction and that the only means of attacking him is by petition of right (*Felkin* v. *Herbert* (*Lord*) (1861), 1 Drew. & Sm. 608). An action is not maintainable against the Lord Lieutenant of Ireland for any act done *quâ* Lord Lieutenant (*Sullivan* v. *Spencer* (*Earl*) (1872), I. R. 6 C. L. 173; *Luby* v. *Wodehouse* (1865), 17 I. C. L. R. 618).

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reached by an action in such a form (*h*), the proper and perhaps only remedy in such cases being by petition of right (*i*). But the latter remedy is not, in general, available in tort, or for acts of negligence either by the Crown or its servants (*j*).

Exceptions.

In some cases, however, where Government officials or departments of state have been invested with the attributes of a corporation, whether by statute or, it seems, by the Crown (*k*), there is authority to the effect that they may be sued in their corporate capacity, though not expressly made liable (*l*); and in some instances Government officials or departments are expressly made liable to actions, either in contract, tort, or for negligence in the ordinary form (and in some cases in the colonies by petition of right), according to the prescribed statutory conditions (*m*). But where a

(*h*) *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619, 623.

(*i*) *Ibid.* An ordinary action against the Crown either in name or in substance cannot be maintained (*ibid.*, *per* Sir BARNES PEACOCK, at p. 623; Bac. Abr. tit. Prerog. E, 7.

(*j*) As to tort, see *Feather* v. *R.* (1865), 6 B. & S. 257, infringement of patent by Government department; *Tobin* v. *R.* (1864), 16 C. B. (N. S.) 310. As to negligence, *Canterbury* (*Viscount*) v. *A.-G.* (1843), 1 Ph. 306. See, generally, *Unwin* v. *Wolseley* (1787), 1 Term Rep. 674; *Rogers* v. *Dutt* (1860), 13 Moo. P. C. C. 209, *per curiam* at p. 236; *Grant* v. *Secretary of State for India* (1877), 2 C. P. D. 445.

(*k*) As to the power of bodies incorporated by the Crown to sue and be sued in their corporate capacity, see next note.

(*l*) Thus, the Commissioners of Works and Public Buildings, being incorporated under the Downing Street Public Offices Extension Act, 1855 (18 & 19 Vict. c. 95), with power to purchase land compulsorily under the Lands Clauses Acts, were held liable to be sued in relation to a purchase thereunder (*Re Wood's Estate, Ex parte H.M. Commissioners of Works and Buildings* (1886), 31 Ch. D. 607, C. A., *per* LINDLEY, L.J., at p. 621). *Semble*, the Commissioners did not necessarily represent the Crown in relation to such purchase (*ibid.*) (see also *Graham* v. *Commissioners of Public Works*, [1901] 2 K. B. 781, 788, 790, 791). The Trinity House, being incorporated under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), are not servants of the Crown so as to be exempt from an action for negligence (*Gilbert* v. *Trinity House Corporation* (1886), 17 Q. B. D. 795). In some cases, it is said, the heads of Government departments may be treated as agents of the Crown, but with the power of contracting and being sued as principals, under the doctrine of incorporation (*semble*)—*e.g.*, the Secretary of State for War, the Postmaster-General, and (*semble*) the Commissioners of Woods and Forests (*Graham* v. *Commissioners of Public Works*, *supra*, *per* PHILLIMORE, J., at pp. 790, 791; see also *Thorn* v. *Commissioners of Public Works* (1863), 32 Beav. 490; *Hawley* v. *Steele* (1877), 6 Ch. D. 521). But the Commissioners of Woods and Forests are not liable to a suit for specific performance under the statute 7 Geo. 4, c. 77 (*Nurse* v. *Seymour* (*Lord*) (1851), 13 Beav. 254); and the Secretary of the Board of Trade was held not liable for the wrongful act of a subordinate (*Dixon* v. *Farrer* (1886), 17 Q. B. D. 658; 18 Q. B. D. 43, C. A.). Mandamus does not lie to compel the Commissioners of the Treasury to pay money held by them as servants of the Crown (*R.* v. *Treasury Commissioners* (1872), L. R. 7 Q. B. 387; *Ex parte Walmesley* (1861), 1 B. & S. 81). Corporations intrusted by statute with the execution of public duties, and in receipt of tolls or dues for such public purposes, are liable for acts of negligence (*Parnaby* v. *Lancaster Canal Co.* (1839), 11 Ad. & El. 223, Ex. Ch.), even where they are ignorant of the cause of mischief, if such ignorance is due to culpable negligence (*Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93; see also *Coe* v. *Wise* (1866), L. R. 1 Q. B. 711, Ex. Ch., principle applied to drainage commissioners). See also title ACTION, Vol. I., pp. 17, 18, and cases there cited. As to Government departments generally, see Vol. VII., Part VI., sect. 8.

(*m*) *E.g.*, the Lords Commissioners of the Admiralty are in certain cases empowered to sue and be sued in the ordinary way (*Williams* v. *Admiralty*

remedy is provided by statute where there would otherwise be no remedy by petition of right or otherwise, recourse cannot be had to petition of right if the remedy provided fails (*n*).

Contracts.

634. Under the general rule servants of the Crown and public officers cannot be made personally liable upon contracts entered into by them in their official capacity (*o*), unless from the particular circumstances of the case the intention to render themselves personally liable appears (*p*).

Torts and crimes.

They may, however, be sued and made personally liable for tortious or criminal acts committed by them in their official capacity, without showing malice or want of probable cause (*q*), and State necessity (*r*), or the orders of the Crown (*s*) or of a superior officer (*t*), cannot be pleaded in defence. This principle does not apply to injuries ensuing from the proper performance of duties imposed upon a servant of the Crown by statute (*a*).

(*Lords Commissioners*) (1851), 11 C. B. 420), or by petition of right for negligence or tort under the New Zealand Crown Suits Act, 1881 (*R.* v. *Williams* (1884), 9 App. Cas. 418). Colonial Governors may be sued under 11 Will. 3, c. 12 (11 & 12 Will. 3, Ruff.); Criminal Jurisdiction Act, 1802 (42 Geo. 3, c. 85), ss. 1—5. Proceedings in the ordinary form may be brought against the Crown's nominee on an intestacy under the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), s. 2.

(*n*) *De Bode* (*Baron*) v. *R.* (1851), 3 H. L. Cas. 449. *Quære* whether the case would be the same on the ground of waiver where petition of right lies independently of the statutory remedy; *quære* also whether petition of right can be brought where a statutory remedy is provided (*ibid.*, 465, 468, 469).

(*o*) *Dunn* v. *Macdonald*, [1897] 1 Q. B. 555, C. A., claim for damages for wrongful dismissal. The liability of an ordinary agent for breach of warranty does not apply to public servants as agents of the Crown (*ibid.*, *per* CHITTY, L.J., at p. 557; see also *Graham* v. *Stamper* (1690), 2 Vern. 146, goods sold and delivered to the Master of the Buckhounds). A public officer intrusted by the Crown with money for distribution amongst a certain class of persons under the control of the Crown cannot be sued as trustee for the persons interested (*Kinloch* v. *Secretary of State for India* (1882), 7 App. Cas. 619; *aliter* (*semble*), where a public officer is intrusted with money issued by Government for the use of an individual (*Priddy* v. *Rose* (1817), 3 Mer. 86, *per* GRANT, M.R., at p. 102); or where public officers have a statutory duty to perform, and are not mere servants of the Crown (*R.* v. *Treasury Commissioners* (1835), 4 Ad. & El. 286, mandamus to the Treasury Commissioners to compel payment of money in their hands for the use of an individual under parliamentary authority); or where the relation of trustee and *cestui que trust* exists (*Pen* v. *Baltimore* (*Lord*) (1750), 1 Ves. Sen. 444, *per* Lord HARDWICKE, L.C., at p. 453).

(*p*) *Samuel Bros., Ltd.* v. *Whetherly*, [1907] 1 K. B. 709, 715; [1908] 1 K. B. 184, C. A. (goods ordered on behalf of the commanding officer of a volunteer corps for the use of the corps).

(*q*) *Brasyer* v. *Maclean* (1875), L. R. 6 P. C. 398; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64, 69; *Cobbett* v. *Grey* (1850), 4 Exch. 729. For actions against colonial governors, see *Mostyn* v. *Fabrigas* (1774), Cowp. 161; *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102. As to the liability of public officers on criminal indictment, see *R.* v. *Hall*, [1891] 1 Q. B. 747, 753.

(*r*) *Entick* v. *Carrington* (1765), 19 Stat. Tr. 1029, 1067; see also p. 440, *post*, as to enforcement of treaties.

(*s*) *Danby's* (*Earl*) *Case* (1679), 11 State Tr. 599.

(*t*) *Keighly* v. *Bell* (1866), 4 F. & F. 763, 790, 805; *R.* v. *Thomas* (1816), Russell on Crimes, 6th ed., Vol. III., p. 94; also (1815) 4 M. & S. 442, but not upon that point; and see *Hayling* v. *Okey* (1853), 8 Exch. 531, Ex. Ch.

(*a*) See *Hawley* v. *Steele* (1877), 6 Ch. D. 521, user of land for military purposes.

SECT. 5. The Crown in Relation to the Law.

635. Government departments, public officers and servants of the Crown cannot be made liable for the wrongful acts of their subordinates (*b*).

Immunity of judges.

636. Judges are exempt from liability for all acts done in their official capacity, whether maliciously or not (*c*), even if done outside their jurisdiction, unless they have the knowledge, or means of knowledge, of such want of jurisdiction (*d*).

Liability of magistrates.

637. Justices of the peace may be made liable, by action on the case as for a tort, for acts done in the execution of their office and within their jurisdiction (*e*). But want of reasonable and probable cause must be alleged, and that the act was done maliciously, and if that be not proved the plaintiff is nonsuited, or a verdict goes for the defendant (*f*). For acts done without or in excess of jurisdiction justices of the peace may, in general, be made liable without showing malice and want of reasonable and probable cause (*g*).

Limitation of actions.

638. Actions in the United Kingdom against public officers for acts done in execution or intended execution of Acts of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, must be commenced within six months after the act or default complained of, or, in the case of continuing injury or damage, within six months after the ceasing thereof (*h*).

Suits and actions by or against the Crown in Scotland.

639. Actions, suits, or proceedings instituted in Scotland on behalf of or against or in the interest of the Crown or on behalf of or against any public department (*i*), may lawfully be raised in the name, and at the instance of, or directed against His Majesty's Advocate for the time being as acting under the Crown Suits

Suits by and against the Lord Advocate.

(*b*) *Raleigh* v. *Goschen*, [1898] 1 Ch. 73 (Admiralty), unless clearly shown that the act was that of the head of the department; *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178, C. A. See also *Lane* v. *Cotton* (1701), 1 Ld. Raym. 646 (Postmaster-General); *Nicholson* v. *Mouncey* (1812), 15 East, 384 (captain of H.M.'s ship).

(*c*) *Hamond* v. *Howell* (1677), 2 Mod. Rep. 219; *Miller* v. *Hope* (1824) 2 Sh. Sc. App. 125; *Fray* v. *Blackburn* (1863), 3 B. & S. 576; *Dicas* v. *Brougham* (*Lord*) (1833), 6 C. & P. 249; *Scott* v. *Stansfield* (1868), L. R. 3 Exch. 220; *Haggard* v. *Pelicier Frères*, [1892] A. C. 61, P. C.; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, C. A.

(*d*) *Calder* v. *Halket* (1839), 3 Moo. P. C. C. 28; and see *Houlden* v. *Smith* (1850), 14 Q. B. 841; *Carratt* v. *Morley* (1841), 1 Q. B. 18; *Beaurain* v. *Scott* (1813), 3 Camp. 388; *Lowther* v. *Radnor* (*Earl*) (1806), 8 East, 113; and *Pease* v. *Chaytor* (1863), 3 B. & S. 620.

(*e*) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1; and see title MAGISTRATES. Defamatory statements made by a magistrate, while sitting in the course of his judicial duties, are not actionable (*Law* v. *Llewellyn*, [1906] 1 K. B. 487, C. A.).

(*f*) *Ibid.*

(*g*) *Ibid.*, s. 2; and see title MAGISTRATES.

(*h*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1. As to the provisions relating to costs in such actions, and tender of amends, see *ibid.*, and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*i*) "Public department" in the Act includes the Treasury, War Department, Post Office, Board of Inland Revenue, Board of Customs, Commissioners of Woods, and of Works, Board of Trade, and all the like public departments, bodies or boards, and all and every officer and officers, person and persons, acting on the behalf of, or in the interest of, or entitled on the 17th August, 1857, to sue on the behalf of, or in the interest of, any such public department.

(Scotland) Act, 1857, provided that before instituting or defending any such suit or proceeding the Advocate has the authority thereunto of His Majesty or of the public department on whose behalf or against whom the suit or proceeding is instituted (*k*). But no private party in suits or proceedings so instituted may challenge or impugn the instance of or title to defend the action, suit, or proceeding, or the right or title of His Majesty's Advocate to raise and prosecute or defend the same upon any allegation that such authority has not been granted, or that evidence of the same is not produced (*l*).

These provisions are not to affect the instance or defence of any action or proceeding instituted in conformity with the law as existing on the 17th August, 1857.

Abatement on change of Lord Advocate.

Actions, suits, or proceedings raised at the instance of or against His Majesty's Advocate are not to abate or be affected by any change in the person holding that office (*m*).

SECT. 6.—*The Crown in Relation to the Royal Forces.*

SUB-SECT. 1.—*General Powers of the Crown.*

Statutory regulations.

640. Though the supreme command and governance of the royal forces is vested in the Crown at common law and by statute (*n*), many matters relating thereto are now principally regulated by statute. Such are, generally, the raising or embodying of the regular, reserve, territorial, and auxiliary forces, and their subjection, when raised or embodied, to special codes of military or naval discipline; the general mode of enlistment and term of service of soldiers and sailors, with many other matters relating to the pay, pensions, decorations, effects, billeting, privileges and exemptions, and civil duties and liabilities of soldiers and sailors; the impressment of carriages; military banks, booty taken in war, and naval prize (*o*). The general administration of the Acts relating to these matters is controlled by the Admiralty and the War Office respectively (*p*).

The Admiralty and the War Office.

641. Apart from these statutory provisions, many wide and important powers relating to the royal forces are, however, still retained by the Crown, this discretionary authority being exercised on the advice of its constitutional and responsible ministers, the First Lord of the Admiralty or the Secretary of State for War, and through the recognised executive channels of the Admiralty and the War Office. The powers so left to the unfettered control of the Crown and its servants embrace such matters as the selection and appointment of the officers to whom the supreme command is delegated and the apportionment of their duties; the grouping

(*k*) Crown Suits (Scotland) Act, 1857 (20 & 21 Vict. c. 44), ss. 1, 2, 4.
(*l*) *Ibid.*, s. 3.
(*m*) *Ibid.*, s. 5.
(*n*) See p. 418, *post*.
(*o*) As to these, see title ROYAL FORCES.
(*p*) As to the constitution and functions of the Admiralty and the War Office, see Vol. VII., Part VI., sect. 8.

SECT. 6. The Crown in Relation to the Royal Forces.

and disposal of the various ships, squadrons, and battalions, and other naval or military units, at home and abroad, in time of peace or war; and, generally, all matters relating to the organisation, disposition, *personnel*, armament, and maintenance of the military and naval forces (*q*).

SUB-SECT. 2.—*The Supreme Command.*

The supreme command.

642. The supreme government and command of all forces by sea and land, and of all forts and places of strength, is vested in the Crown by prerogative right at common law and by statute (*r*).

The Sovereign has, however, long since ceased to exercise the supreme command in person (*s*), nor is it legally necessary that he should do so, for he is expressly empowered to make regulations as to the persons to be invested as officers or otherwise with command over the royal forces, or any part thereof, or any person belonging thereto, and as to the mode in which the command is to be exercised (*t*).

Military advisers of the Crown.

In all military matters the Crown now acts upon the advice of the Secretary of State for War, who is a member of the Cabinet and of the Army Council, and is responsible to Parliament for the advice given to the Crown (*a*), and to the Crown and Parliament for all the business of the Army Council (*b*).

Commander-in-chief.

643. The executive command of the army was formerly delegated to a commander-in-chief, who advised the Secretary of State on all military matters, the latter remaining responsible to Parliament and the Crown, but on the abolition of that office in 1904 his function became vested in the present Army Council (*c*), in purely administrative matters (*d*), and in an Inspector-General and

Army Council.

(*q*) See, generally, title ROYAL FORCES.

(*r*) Com. Dig. tit. Prerog. C, 3; 13 Car. 2, stat. 1, c. 6. Under the Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), s. 6, all jurisdiction, powers, duties, command and privileges over or in relation to the yeomanry and volunteers of England, Scotland, and Ireland formerly vested in or exercisable by the lieutenants of counties or the Lord Lieutenant of Ireland reverted to and became exercisable by His Majesty, through his Secretary of State or any officers to whom such powers etc. might be delegated with the advice of the Secretary of State; all officers in the yeomanry and volunteers are to hold their commissions from the Crown, and such commissions are to be prepared, authenticated and issued as those of His Majesty's land forces; see title ROYAL FORCES.

(*s*) The King gave up the personal command of the army in 1793, when the first commander-in-chief was created (see Pol. Hist. Eng., Vol. X., p. 362; Clode, Military Forces of the Crown, Vol. I., p. 240).

(*t*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 71 (1). This provision was enacted to remove doubts as to the powers previously vested in officers and others (*ibid.*), and is not to be deemed to be in derogation of any power otherwise vested in the Crown (*ibid.*, s. 71 (2)).

(*a*) As to the doctrine of ministerial responsibility, see Vol. VII., Part VI., sects. 1 and 2, *post*.

(*b*) See Order in Council, 10th August, 1904 (*London Gazette*, 16th August, 1904).

(*c*) See Letters Patent, 6th February, 1904 (*London Gazette*, 12th February, 1904).

(*d*) As to the composition and duties of the Army Council, see Order in Council, 10th August, 1904, note (*b*), *ante*; and as to the Army Council and the War Office generally, see Vol. VII., Part VI., sect. 8.

President of the Selection Board, assisted by a staff officer and five inspectors, as to purely executive matters (*e*). The Army Council and Inspector-General, with their various departments, form the Headquarters Staff of the army (*f*).

Naval advisers of the Crown.

644. In naval matters the Crown acts upon the advice of the First Lord of the Admiralty, who is a member of the Cabinet and responsible to Parliament for the advice so given, whilst the supreme command is delegated to the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland (*g*), known as the Admiralty, of whom the First Lord is one (*h*). These Commissioners exercise the jurisdiction and powers enjoyed by the Crown at common law, or conferred upon it by statute (*i*).

Command of the fleet.

The executive command of the fleet on actual service is intrusted to the various admirals of the fleet (*k*), admirals, vice-admirals, rear admirals, and other officers, who hold their commissions from the Admiralty (*l*).

SUB-SECT. 3.—*Maintenance and Discipline of the Royal Forces.*

Annual Army Act.

645. The Crown being expressly prohibited from raising or keeping a standing army within the kingdom in time of peace unless with the consent of Parliament (*m*), the necessary authority for the maintenance of the forces to be employed for the defence of the United Kingdom and of the possessions of the Crown, including those to be employed at the depôts in the United Kingdom for the training of recruits for service at home and abroad, but exclusive of the numbers actually serving within His Majesty's Indian possessions, is supplied annually by statute (*n*).

(*e*) This distribution of duties between the Army Council and inspectors was due to the report of Lord Esher's Committee, published in 1904. The duties of the Inspector-General are regulated by Order in Council (see Order in Council, 10th August, 1904, note (*b*), *ante*). They are generally to act under the orders and direction of the Army Council, and review, and report to the latter on, the practical results of the policy of the Council, and for that purpose to inspect and report upon the training and efficiency of all troops under the control of the home Government, on the suitability of their armament and equipment, on the condition of fortifications and defences, and generally on the readiness and fitness of the army for war.

(*f*) As to these departments, see Vol. VII., Part VI., sect. 8, and, generally, title ROYAL FORCES.

(*g*) Admiralty Acts, 1690 and 1827 (2 Will. & Mar. sess. 2, c. 2, ss. 1, 2; 7 & 8 Geo. 4, c. 65, s. 2). The style of the Commissioners, as given in the text, is conferred as to deeds, documents etc., by stat. 2 & 3 Will. 4, c. 40, s. 7.

(*h*) See Vol. VII., Part VI., sect. 8.

(*i*) See Vol. VII., Part VI.. sect. 8, and title ROYAL FORCES.

(*k*) Of these there are at present only two, one being the First Lord of the Admiralty, whilst the honorary rank of admiral of the fleet has also been conferred upon certain distinguished persons.

(*l*) As to the appointment and tenure of office of officers in the navy, see title ROYAL FORCES.

(*m*) Bill of Rights, 1688 (1 Will. & Mar., sess. 2, c. 2), s. 1. This provision is set out in the preamble to the Army (Annual) Act (see the Army (Annual) Act, 1908 (8 Edw. 7, c. 2)).

(*n*) See the Army Annual Act, 1908 (8 Edw. 7, c. 2), preamble, which states

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The total number of the forces so adjudged necessary by the Crown and Parliament in the year 1908 was one hundred and eighty-five thousand (*o*).

Territorial Force.

646. In addition to these forces, His Majesty is empowered to raise and maintain a force to be called "the Territorial Force," consisting of such number of men as may from time to time be provided by statute (*p*); and the army and militia reserves and the militia are maintained under the authority of various Acts (*q*).

Maintenance of Navy.

647. The regular naval forces are maintained by the Crown without any direct statutory authority, none such being required by the law of the constitution (*r*). The employment of the Royal Marine forces under the Admiralty, and their subjection to military law when quartered on shore, or at other times when not subject to the Naval Discipline Acts, is impliedly authorised annually by statute (*s*), though their numbers are not mentioned. The naval reserve forces are raised under the authority of various Acts (*t*).

Martial law.

648. The issue of commissions of martial law by the Crown, and the subjection of any person in time of peace to any other than the

that "it is adjudged necessary by His Majesty and this present Parliament that a body of forces should be continued" etc. The maintenance by the Crown on its sole authority and subjection to military discipline of the train bands, or militia, which, with the old feudal array, constituted the only form of troops then raised, became recognised during the reign of Charles I. as the mainstay of despotism. The feudal array had fallen into disuse long before the feudal tenures were abolished in 1661 (see 12 Car. 2, c. 24). Charles II. maintained a force of guards, and this with parliamentary sanction, which is the origin of the present standing army; they were increased to 30,000 by James II. on his own authority (see 2 Steph. Com., 14th ed., 570). After the revolution of 1688 the standing army was placed on a legal footing by means of annual Mutiny Acts, the guards and garrisons being voted annually until the beginning of the last century, when they were included in the regular army (see Clode, Mil. Forces of the Crown, Vol. I., 93, pp. 363, 364). From 1881 onwards the annual Army Act has taken the place of the Mutiny Acts.

(*o*) Army (Annual) Act, 1908 (8 Edw. 7, c. 2), preamble. Persons subject to military law are not exempted from the provisions of the Army Act by reason only that the number of the forces for the time being in the service of His Majesty (exclusive of the marine forces) is either greater or less than one hundred and eighty-five thousand (*ibid.*, s. 2 (3)).

(*p*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 6. As to these forces generally, see title ROYAL FORCES.

(*q*) As to the army and militia reserves, see the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48). As to the militia, see the Militia Act, 1882 (45 & 46 Vict. c. 49), s. 3; Local Militia Act, 1812 (52 Geo. 3, c. 38). As to the yeomanry, see the Yeomanry Act, 1804 (44 Geo. 3, c. 54). As to the volunteers, see the Volunteer Act, 1863 (26 & 27 Vict. c. 65). As to these forces generally, see title ROYAL FORCES.

(*r*) An indirect control is, however, exercised by Parliament in the granting of supplies necessary to meet the expenses of the annual estimates for the navy. As to the enlistment of naval recruits under the Naval Enlistment Acts, 1835 to 1884, and the naval forces generally, see title ROYAL FORCES. The maintenance of the naval forces does not appear to have been regarded by Parliament as a menace to the liberties of the subject, hence the absence of enactments compelling parliamentary sanction.

(*s*) See the Army (Annual) Act, 1908 (8 Edw. 7, c. 2), preamble.

(*t*) As to these forces, see title ROYAL FORCES.

established laws of the realm as enacted by Parliament, is contrary to the law of the constitution (*u*). The special code of laws to which the naval and military forces are subjected in time of peace for the preservation of discipline requires, therefore, express parliamentary sanction (*x*).

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The special laws to which the naval forces are subjected are enacted in the form of permanent Acts (*a*).

The discipline of the military forces is regulated by statute (*b*), which expires and is re-enacted annually (*c*), the dates at which the Act comes into force varying for different portions of the British dominions (*d*). In addition to this code of military law, the Crown is empowered to make articles of war for the better government of officers and soldiers, and such articles are to be judicially noticed in all courts (*e*). The penalties, however, which may be inflicted by such articles are strictly limited (*f*).

Discipline.

SECT. 7.—*The Crown in Relation to the Colonies.*

SUB-SECT. 1.—*Legislative Powers of the Crown.*

649. Foreign territory may be acquired by England through settlement by British subjects, or by conquest, with or without

Acquirement of territory.

(*u*) Magna Carta, 1297 (25 Edw. 1, c. 29; 9 Hen. 3, Ruff.; Statutes of the Realm, p. 117); Petition of Right, 1627 (3 Car. 1), ss. 3, 7, 10, 11; and see the Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2), and the Army (Annual) Act, 1908 (8 Edw. 7, c. 2), preamble. As to the legal status of sailors and soldiers generally, see title ROYAL FORCES.

(*x*) Military justice was administered originally in the court of the Constable and Earl Marshal, hence the term "martial law." Both these offices were hereditary, and on the former becoming extinguished by the attainder of the Duke of Buckingham in the reign of Henry VIII. the jurisdiction of the court should have reverted to the Crown, but the court seems to have continued to exist, until in 1703 it was made clear that without the Constable the court was not properly constituted (*Chambers* v. *Jennings* (1703), 7 Mod. Rep. 125). The office of Earl Marshal is still hereditary in the Duke of Norfolk's family. See Adye on Courts-martial, p. 3. The term "military" law is now applied to the legal code under the Army (Annual) Acts, whilst "martial" law is applied to proclamations of martial law by the Crown by virtue of what remains of the old prerogative right of regulating the code of justice in the court of the Constable and Earl Marshal.

(*a*) Naval Discipline Acts, 1866 and 1884 (29 & 30 Vict. c. 109, and 47 & 48 Vict. c. 39). As to naval discipline generally, the times at which the naval reserves etc. are subject to naval discipline, and the application of the Acts to the marines and naval reserves, see title ROYAL FORCES.

(*b*) Army Act, 1881 (44 & 45 Vict. c. 58), as amended by the subsequent annual Army Acts. As to military law generally, see title ROYAL FORCES.

(*c*) Re-enacted by the Army (Annual) Acts.

(*d*) The dates under the Army (Annual) Act, 1908, are as follows: within the United Kingdom, the Channel Isles, and the Isle of Man, from the 30th April; elsewhere, whether within or without His Majesty's dominions, from the 31st July. The Act is put in force until similar dates in 1909 respectively, both dates being inclusive. As to the application of military law to the territorial and reserve forces, militia, volunteers etc., see title ROYAL FORCES.

(*e*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 69.

(*f*) *Ibid.* Punishment extending to life or limb, or penal servitude, may not be inflicted by the articles, except for crimes expressly made so punishable by the Army Act, 1881, and no crime made punishable by the latter Act may be made punishable in any manner not in accordance with the Act (*ibid.*).

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a formal act of annexation in either case (*g*), and also by treaty, or by articles of capitulation following upon a successful war (*h*), or by the peaceful cession of territory by treaty entered into with a foreign State (*i*).

Authority of Crown in colonies.

Territory so acquired becomes a British colony (*k*), and the authority of the Crown extends thereto as fully in all respects as it exists in England (*l*); and though the Crown may subsequently cede such territory to a foreign State by treaty (*m*), it may not, in general, part with its prerogatives so as to constitute another sovereign in any portion of the British dominions (*n*).

Nor may a British subject acquire foreign territory in his own right so as to be exempt from the authority and jurisdiction of the Crown (*o*), though the legal status of a British subject to whom the sovereignty or right of government over territory of a foreign State has been granted by such State appears to be open to doubt (*p*).

(*g*) Annexation may be effected by statute (*e.g.*, the annexation of Basutoland in 1871 by the Cape of Good Hope Act No. 12 of 1871), Order in Council (*e.g.*, the annexation of Ashanti by Order in Council 26th September, 1901, consequent upon the success of the British arms in that year), letters patent (*e.g.*, the annexation of Morant and Pedro Cays to Jamaica by letters patent of 14th March, 1882 (*London Gazette*, 1882, p. 1113)), or proclamation (*e.g.*, the annexation of the Transvaal and Orange River colonies by proclamations issued by Field Marshal Lord Roberts 1st September, 1900, and 24th May, 1900, under the authority of a royal commission under the sign manual and signet). Annexation may be effected in the case of vacant or sparsely populated territory either with or without previous settlement, though some form of settlement, however slight, usually precedes formal annexation. Thus, the planting of the British flag by the naval authorities on uninhabited or savage islands usually precedes annexation, and various possessions in North America, where previous settlement was sometimes slight, have been annexed to the Dominion of Canada either by statute (*e.g.*, Rupertsland in 1870 by Canadian Act 33 Vict. c. 3), or by Order in Council (*e.g.*, Orders in Council 23rd June, 1870; 16th May, 1871; 26th June, 1873; 31st July, 1880; 18th December, 1897). Similarly territory may be acquired by conquest and occupation or by settlement without formal act of annexation. Thus, Australia, though populated by savage tribes, was acquired by settlement, and does not appear to have been formally annexed. See also title DEPENDENCIES AND COLONIES.

(*h*) As to the powers of the Crown with regard to treaties, see p. 439, *post*. As to the legal aspect of the capitulation of the Boer forces in the field, see note (*d*), p. 444, *post*.

(*i*) As to the powers of the Crown to make exchanges of territory by treaty, see p. 440, *post*.

(*k*) A colony is statutorily defined as being "any part of His Majesty's dominions exclusive of the British Islands (namely, the United Kingdom, the Channel Islands, and the Isle of Man), and of British India (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (1), (3); and see title DEPENDENCIES AND COLONIES).

(*l*) *Re Bateman's Trust* (1873), L. R. 15 Eq. 355.

(*m*) As to the power of the Crown to cede territory, see p. 440, *post*.

(*n*) See p. 455, *post*.

(*o*) If acquired by conquest, such territory becomes a dominion of the Crown in right of the Crown, and, if by settlement, the authority of the Crown extends thereto (*Campbell* v. *Hall* (1774), 20 State Tr. 239, *per* Lord MANSFIELD, C.J., at pp. 287, 322, 323. See also, as to settled colonies, *Bengal* (*Adv.-Gen.*) v. *Ranee Surnomoye Dossee* (1862), 9 Moo. Ind. App. 387, and generally title DEPENDENCIES AND COLONIES).

(*p*) See the Report of the Commissioners to inquire into the status of Rajah Brooke in Borneo, 1855, where the Commissioners inclined to the opinion that,

Rights of the Crown.

650. In settled, conquered, and ceded colonies, before representative legislatures have been granted (*q*), and where unrestricted by articles of capitulation or treaty, the Crown enjoys the prerogative right of establishing laws and public institutions, appointing executive officers, and erecting courts (*r*), and these rights with regard to British settlements (*s*) have been placed upon a statutory basis, and may be delegated by any instrument under the Great Seal, or by instructions under the sign manual referred to in such instrument, to any three or more persons within the settlement (*t*).

The Crown may not, however, make laws contrary to the fundamental principles of the British Constitution, or exempting persons from the general laws of trade or the authority of Parliament, or granting exclusive privileges to individuals (*a*); and every colony is subject to the paramount authority of the Imperial Parliament (*b*).

Crown colonies.

651. In Crown colonies, namely, colonies to which representative, or representative and responsible government, has not been granted, the right of legislation enjoyed by the Crown is usually exercised either through a governor, commissioner, or administrator, alone, or through a governor or commissioner assisted by legislative and executive councils nominated by the Crown or by the governor or commissioner (*c*), the Crown retaining

in face of the statutory assertion of the sovereignty of the Crown over the territory of the East India Company contained in the East India Company Act, 1813 (53 Geo. 3, c. 155, s. 95), no British subject could attain to the position of an independent ruler of a foreign country. See, generally, title DEPENDENCIES AND COLONIES.

(*q*) For the purposes of the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), which regulates the powers of colonial representative legislatures, the term "representative legislature" signifies any colonial legislature which shall comprise a legislative body of which one half are elected by the inhabitants of the colony (*ibid.*, s. 1).

(*r*) *Campbell* v. *Hall* (1774), 20 State Tr. 239. The right of legislation may be exercised by Order in Council, and also, it seems, by proclamation or letters patent (see *Jephson* v. *Riera* (1835), 3 Knapp, 130, at p. 152, P. C., and title DEPENDENCIES AND COLONIES).

(*s*) "British settlement" under the Act means any British possession out of the United Kingdom which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the legislature constituted otherwise than by virtue of the Act, or of any Act repealed by the Act, of any British possession (British Settlements Act, 1887 (50 & 51 Vict. c. 54), s. 6; see also title DEPENDENCIES AND COLONIES).

(*t*) British Settlements Act, 1887 (50 & 51 Vict. c. 54), ss. 2—5. The powers as to legislation etc. are authorised to be exercised by His Majesty in Council, namely, by Order in Council. Where the powers are delegated under the Act, the instrument or instructions must be laid before both Houses of Parliament as soon as conveniently may be, and notwithstanding such delegation His Majesty in Council may exercise all or any of the powers conferred by the Act (*ibid.*, ss. 2, 3; and see title DEPENDENCIES AND COLONIES).

(*a*) *Campbell* v. *Hall*, *supra*, at 323.

(*b*) *Ibid.*, 322, 323; Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 2; and see title DEPENDENCIES AND COLONIES.

(*c*) The office of governor and form of constitution is constituted by letters patent, *e.g.*, letters patent of 2nd August, 1901, for the Transvaal Colony (Stat. R. & O., 1901, p. 540); whilst the governor or commissioner is appointed by commission under the sign manual and signet, and his duties and the functions of the government generally may be further defined or detailed by

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the right of veto, and, in most cases, of legislating by Order in Council (*d*).

Representative legislatures (*e*) may be conferred upon a colony either by the Crown or by Act of Parliament (*f*), and where this has been effected without conferring the full system of ministerial responsibility obtaining in England, the governor and other public officers remain under the control of, and are responsible to, the Crown, acting through the Secretary of State for the Colonies (*g*).

Grant of representative government.

The grant of representative institutions may be followed by the introduction of full representative and responsible government, similar to that of England, the governor, governor-general, or lieutenant-governor, as representing the Crown, occupying, with regard to the legislature and executive of the colony, a relation similar to that occupied by the Sovereign with regard to the Imperial legislature and executive, and exercising, in general, similar powers and duties, and enjoying similar privileges (*h*). Such representative and responsible government may be conferred either by Act of a representative colonial legislature unless expressly prohibited (*i*), or by Imperial statute (*k*), or by letters patent (*l*), and when so granted the governor alone remains responsible to the Crown, whilst the ministry, or heads of the colonial executive, become responsible to their own legislatures (*m*).

instructions under the sign manual and signet, or conveyed through the Secretary of State for the Colonies. Acts of the governor or legislature so constituted are usually termed "ordinances." See also title DEPENDENCIES AND COLONIES.

(*d*) This right is usually expressly retained by the letters patent, or other document (see note (*c*) on p. 423, *ante*), regulating the constitution, as in the case of Gibraltar, Labuan, Ceylon, Hong Kong, and many other colonies. But the absence of such express power would not, it is apprehended, prevent the Crown's right of legislating by Order in Council or otherwise (see also title DEPENDENCIES AND COLONIES).

(*e*) See note (*q*) on p. 423, *ante*, as to the meaning of "representative legislature."

(*f*) Such institutions are usually granted by letters patent, *e.g.*, letters patent of 26th February, 1877, and 31st March, 1905, conferring representative institutions upon Cape Colony and the Transvaal respectively. See also title DEPENDENCIES AND COLONIES.

(*g*) For the various colonies in which representative governments are established, and the details relating thereto, see title DEPENDENCIES AND COLONIES.

(*h*) For the colonies with representative and responsible governments and the form of their constitution and the powers and duties of colonial governors, see title DEPENDENCIES AND COLONIES.

(*i*) Under the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 5 (see title DEPENDENCIES AND COLONIES), which is apparently declaratory only of the common law. Thus, representative institutions were granted to Cape Colony by letters patent in 1870, and in 1872 the Cape Legislature passed an Act (No. 1 of 1872) establishing responsible government which was ratified by the Crown by Order in Council of 9th August, 1872. As to the present constitution of Cape Colony under letters patent of 26th February, 1877, see title DEPENDENCIES AND COLONIES.

(*k*) *E.g.*, the British North America Act, 1867 (30 & 31 Vict. c. 3), establishing the constitution of Canada; the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12). See also title DEPENDENCIES AND COLONIES.

(*l*) *E.g.*, letters patent of 26th February, 1877, as to Cape Colony; of 31st March, 1905, as to the Transvaal Colony.

(*m*) As to ministerial responsibility in England, see Vol. VII., Part VI., sects. 1 and 2; and as to the colonies generally, see title DEPENDENCIES AND COLONIES.

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Effect on the prerogative.

652. Where representative or representative and responsible government has been conferred upon a colony, the Crown, in general, loses the right of legislation with regard to the colony unless expressly retained (*n*), but retains its prerogatives with regard to rights of property (*o*); whilst the prerogatives in relation to government become assimilated to those exercisable by the Crown with regard to the Imperial Government (*p*), though delegated to the governors of the various colonies. Of these the governor-in-chief in any colony is invariably appointed by the Crown (*q*).

Right of veto on legislation.

The right of granting or withholding assent to colonial Bills is thus retained by the Crown, though exercisable in general by the governor (*r*); and where a colonial Bill has obtained the governor's assent, the measure is in all cases liable to disallowance by the Crown, subject to conditions as to the time within which such disallowance is permissible in certain cases (*s*). Moreover, whether with or without responsible government, colonies remain subject to the paramount legislative authority of the Imperial Parliament (*t*).

Status of governor in Crown colonies.

653. In colonies without representative and responsible forms of government the powers and authorities delegated to the governor are strictly limited and defined by the letters patent by which his office is constituted, as also by the terms of his commission on appointment, and any further instructions which may be directed to him under the sign manual, or by the Secretary of State (*a*). But within the limits of his authority he has absolute discretion (*b*).

In representative colonies.

654. In colonies with representative and responsible government the governor's powers are nominally wider, but in practice he must assume the position of an English constitutional sovereign, and must accept the advice of his ministers where no Imperial

(*n*) *Campbell* v. *Hall* (1774), 20 State Tr. 239, 328, 329.

(*o*) *Re Bateman's Trust* (1873), L. R. 15 Eq. 355.

(*p*) See title DEPENDENCIES AND COLONIES.

(*q*) As to the appointment and duties of, and the law relating to, colonial governors generally, see *ibid.* In Australia the governors of the various States which form the Commonwealth, as also the Governor-General, are appointed directly by the Crown (see Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), ss. 61, 106), whilst in Canada the Governor-General is appointed directly by the Crown, the lieutenant governors of the various provinces which form the Dominion being appointed by the Governor-General in council under the Great Seal of Canada, and being dismissible by him (British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 58, 59; see also title DEPENDENCIES AND COLONIES). The latter mode of appointment is not unconstitutional, the act of the Governor-General in council in making the appointment being the act of the Crown (*Maritime Bank of Canada (Liquidators)* v. *Receiver-General of New Brunswick*, [1892] A. C. 437, *per* Lord WATSON, at p. 443).

(*r*) As to provisional assent by a colonial governor and the cases in which the Bill must be either reserved for the royal assent, or the governor's assent confirmed by the Crown, see title DEPENDENCIES AND COLONIES.

(*s*) See *ibid.*

(*t*) See the references in note (*b*), p. 423, *ante*.

(*a*) See note (*c*), p. 423, *ante*.

(*b*) See also title DEPENDENCIES AND COLONIES.

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interests are at stake, and where the colonial constituencies are at one with the ministry (*c*).

SUB-SECT. 2.—*Powers of Jurisdiction.*

Crown colonies.

655. In colonies without representative legislatures the Crown enjoys the right of establishing such courts, appointing such officers, and making such rules for the administration of justice, as it pleases (*d*), and the common law rule restraining the creation of courts of equity or ecclesiastical courts, or of courts to administer any other than the common law, does not, it seems, apply (*e*).

Representative colonies.

656. The Crown's right of establishing courts ceases, in general, with the grant of a representative or representative and responsible legislature, unless expressly reserved (*f*). Thus, in such colonies the Crown cannot by appointing a bishop confer coercive jurisdiction in ecclesiastical matters (*g*); and in such cases obedience to ecclesiastical jurisdiction can only be enforced by applying to the secular courts (*h*), which will enforce rights of property and other church matters in so far as they fall within the common or statute law relating to contract or otherwise.

Appeals.

657. In all cases, however, the Crown retains jurisdiction on appeal from the highest civil or criminal court in any colony (*i*), subject to the restrictions imposed by statute or Order in Council, or by rules in force in the colony, and subject also to the rules of practice observed by the Judicial Committee of the Privy Council in relation to such appeals (*k*).

(*c*) In New Zealand, in 1892, the nominated Upper Chamber refused to support measures introduced by the Premier with a large parliamentary majority and passed in the Lower House. The ministry having demanded an increase in the numbers of the Upper House sufficient to give the Government a majority, the Governor was instructed by the Colonial Secretary that he must accept the advice of the ministry under the conditions stated in the text above.

(*d*) See p. 423, *ante*.

(*e*) As to this rule, see p. 402, *ante*. The Crown would, however, not be entitled to erect courts or make rules of justice contrary to the fundamental laws of the constitution, or contrary to the general laws of trade and the liberties of the subject.

(*f*) See p. 425, *ante*, and titles COURTS; DEPENDENCIES AND COLONIES.

(*g*) *Re Natal* (*Bishop*) (1864), 3 Moo. P. C. C. (N. S.) 115; *Long* v. *Cape Town* (*Bishop*) (1863), 1 Moo. P. C. C. (N. S.) 411. See also titles COURTS; DEPENDENCIES AND COLONIES.

(*h*) *Natal* (*Bishop*) v. *Gladstone* (1866), L. R. 3 Eq. 1.

(*i*) The appellate jurisdiction of the Crown is inherent and inseparable from it, and could not therefore be negatived by a grant of sovereignty containing no reservation of the right (see *Christian* v. *Corren* (1716), 1 P. Wms. 329, 330; Bac. Abr. tit. Prerog. D, 1). Since 1833 appeals from colonial courts lie to the Judicial Committee of the Privy Council (Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41). See also titles COURTS; DEPENDENCIES AND COLONIES). To meet the fact that rules in force in certain colonies prevented appeals from courts other than courts of error or appeal in such colonies, the Crown was empowered by statute to provide by Order in Council for appeals to the Crown from any colonial court, though not a court of error or appeal (Judicial Committee Act, 1844 (7 & 8 Vict. c. 69), s. 1).

(*k*) As to the rules regulating appeals from the various colonies, and the practice of the Judicial Committee, see titles COURTS; DEPENDENCIES AND COLONIES; PRACTICE AND PROCEDURE.

But, even where so restricted, the Crown in all cases enjoys the prerogative right of granting special leave to appeal, unless such right is negatived by express words in an Act of the Imperial Parliament or a charter of justice (*l*).

SECT. 8.—*The Crown in Foreign Relations.*

SUB-SECT. 1.—*In General.*

Conduct of foreign affairs.

658. By the law of the English constitution the Crown acts as the delegate or representative of the nation in the conduct of foreign affairs, and what is done in such matters by the royal authority is the act of the whole nation, and binding, in general, upon the latter without further sanction (*m*).

The Crown, therefore, enjoys the sole right of appointing ambassadors, diplomatic agents, consuls and other officers, through whom intercourse with foreign nations is conducted, and of receiving those of foreign States (*n*), of making treaties, declaring peace and war (*o*), and generally of conducting all foreign relations. Such matters are intrusted in general to the absolute discretion of the Sovereign, acting through the recognised constitutional channels upon the advice of the Cabinet or the Secretary of State for Foreign Affairs, unfettered by any direct supervision, parliamentary or otherwise (*p*). An indirect means of control is, however, supplied by the customary or conventional law of the constitution relating to the Cabinet system, the doctrine of ministerial responsibility (*q*), and the consequent fear of loss of office or, perhaps, impeachment (*r*). Moreover, it is recognised as a constitutional maxim or convention

(*l*) *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, overruling *Cuvillier* v. *Aylwin* (1832), 2 Knapp, 72, P. C.; *R.* v. *Alloo Paroo* (1847), 5 Moo. P. C. C. 296.

(*m*) 1 Bl. Com., 14th ed., 252. Anything that is done in such matters without the royal authority is merely the act of private persons (*ibid.*). See also p. 443, *post*, as to acts of hostility by private persons against a friendly State.

(*n*) 1 Bl. Com., 14th ed., 252, 253. As to ambassadors and diplomatic agents generally, see pp. 428 *et seq.*, *post*.

(*o*) 1 Bl. Com., *ante*, 257.

(*p*) As to the Cabinet, the Secretary of State for Foreign Affairs and the Foreign Office, and the personal intervention of the Sovereign in the conduct of foreign affairs, see Vol. VII., Part. VI., sect. 8. The relations of ministers of the Crown with foreign powers should be conducted through the proper official and diplomatic channels, and, it seems, be fully disclosed to and open to the criticism and supervision of the Cabinet and of the Ministry as a whole. Deviation from this course on the part of ministers with regard to matters of State exposes their motives to the danger of misinterpretation and is not tolerated by the House of Commons. The danger incurred by a minister who conducts a secret correspondence with foreign powers or agents is clearly shown by the impeachment of the Earl of Danby, 1678—85 (see *Danby's (Earl) Case* (1678-85), 11 State Tr. 599, 621, 622), where the first article of the impeachment charged him with having "traitorously encroached to himself regal power by treating in matters of peace and war with foreign ministers and ambassadors, and giving instructions to His Majesty's ambassadors abroad without communicating the same to the Secretaries of State and the rest of His Majesty's Council" (*ibid.*, 621—623).

(*q*) As to ministerial responsibility, see Vol. VII., Part. VI., sects. 1 and 2.

(*r*) As to impeachment by the Commons, see title PARLIAMENT.

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that declarations of peace and war, and the conduct of foreign relations, must be in conformity with the wishes of Parliament, and in certain cases treaties require special parliamentary sanction (*s*).

SUB-SECT. 2.—*Ambassadors and other Diplomatic Persons: their Privileges and Immunities.*

(1.) *Public Ministers and their Entourage.*

Diplomatists.

659. The persons who partake, to a greater or less degree, of a diplomatic character (*a*) fall into three classes:—

(1) Public ministers, who by the operation of the treaties of Vienna (1815) (*b*) and of Aix-la-Chapelle (1818) (*c*) are divided into—(a) ambassadors, legates, or nuncios; (b) envoys, ministers, and other persons accredited to the Sovereign; (c) ministers resident; (d) *chargés d'affaires*, accredited, not to the Sovereign, but to the minister for foreign affairs.

This classification is only of importance with regard to questions of precedence and ceremonial.

(2) The family, suite, and servants of public ministers, to whom some degree of privilege attaches in the interests of the minister of whose family, suite, or establishment they are members.

(3) Persons of a *quasi*-diplomatic character, namely, consuls and consular officers.

Privileges of public ministers.

660. The immunities accorded to public ministers by the usages of nations, which have come to be known as international law (*d*), are expressly recognised in the law of England (*e*).

(*s*) See p. 440, *post*. Though theoretically no antecedent means exist of preventing the conduct of foreign affairs in a manner derogatory to the honour or interest of the nation, the fear of subsequent impeachment or loss of office acts in practice as a sufficient check upon the ministers of the Crown.

(*a*) The practice of sending ambassadors to conduct particular negotiations dates from a remote antiquity. To such persons immunity from interference has always been accorded. The institution and maintenance of permanent diplomatic missions to represent the interests of sovereign independent States is of comparatively recent origin, and was not generally recognised until the middle of the seventeenth century (Wheaton, International Law, 4th English ed. by Atlay, s. 206; Halleck, International Law, 4th ed., i., 349). The duties of British ministers in the exercise of their diplomatic functions do not fall within the scope of this work. For their duties in connection with the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), the Extradition Act, 1870 (33 & 34 Vict. c. 52), and the Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), see titles CONFLICT OF LAWS, p. 177, *ante*; EVIDENCE; EXTRADITION; HUSBAND AND WIFE.

(*b*) Hertslet, Map of Europe by Treaty, i., 62; State Papers, ii., 179.

(*c*) Hertslet, i., 575; State Papers, v., 1090.

(*d*) The older writers on the subject of diplomatic privilege are cited in *Taylor* v. *Best* (1854), 11 C. B. 487; *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94.

(*e*) The recognition is threefold: (1) by writers of authority (see particularly 4 Co. Inst. 152; 1 Bl. Com. 253, 4 *ibid.*, 70; Com. Dig. tit. Ambassador); (2) by judicial approval (*Triquet* v. *Bath* (1764), 3 Burr. 1478; *Novello* v. *Toogood* (1823), 1 B. & C. 554; *Parkinson* v. *Potter* (1885), 16 Q. B. D. 152); (3) by statute. The Diplomatic Privileges Act, 1708 (7 Ann. c. 12), confers upon public ministers complete immunity from all suits and processes. The statute was enacted in the particular circumstances arising out of the arrest for a trifling debt of the ambassador of the Tsar Peter the Great (for a full account of which

In accordance with the principle *Omnis coactio abesse a legato debet* (*f*), a public minister does not owe even a temporary allegiance to the sovereign to whom he is accredited (*g*), and has at least as great an immunity from suits as the sovereign whom he represents (*h*). He is not supposed even to live within the territory of the State in which he exercises his functions, and is for all juridical purposes supposed to be still in his own country (*i*). He is exempt from the criminal jurisdiction of the State in which he resides (*a*), and is not subject to interference or arrest except, possibly, in the one instance of his engaging in acts contrary to its safety and welfare (*b*). In such case it seems that he may be arrested and detained until he can be conveyed out of the country (*c*), and his

see Martens, Causes Célèbres, i., 47) (Phillimore, International Law, ii., 228; 1 Bl. Com. 254; *Triquet* v. *Bath*, *supra*; *Viveash* v. *Becker* (1814), 3 M. & S. 284; *Novello* v. *Toogood*, *supra*). The statute is merely declaratory of the common law (*Barbuit's Case* (1737), Cas. *temp.* Talb. 281; *Hopkins* v. *De Robeck* (1789), 3 Term Rep. 79; *Triquet* v. *Bath*, *supra*; *Viveash* v. *Becker*, *supra*; *Novello* v. *Toogood*, *supra*), so that, if the statute does not apply, the common law may (*Service* v. *Castaneda* (1845), 2 Coll. 56), for the statute was not intended to abridge the common law (*Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94). International law, it is submitted, has no higher authority than that which is accorded to custom in England, and is accepted subject to the same conditions; compare Bac. Abr. tit. Ambassadors. "Our law pays the greatest regard to rules prescribed by the civil law and the law of nations" (*R.* v. *Keyn* (1876), 2 Ex. D. 63, at pp. 202, 203, *per* COCKBURN, C.J.). See, too, as to the authority of text-writers on international law, *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391, at p. 407). The conclusions from general principles arrived at by foreign tribunals are not within the scope of this section, even when they deal with British diplomatic persons.

(*f*) Grotius, De Jure Belli et Pacis, ii., xviii. 9; *The Charkieh* (1873), L. R. 4 A. & E. 59, at p. 90.

(*g*) *Magdalena Steam Navigation Co.* v. *Martin*, *supra*; but see p. 431, *post*.

(*h*) 4 Co. Inst. 153; *Magdalena Steam Navigation Co.* v. *Martin*, *supra*; *The Parlement Belge* (1880), 5 P. D. 197, at p. 208, C. A.

(*i*) The reason upon which the privilege is founded is of no practical importance. Whether it be deduced from the fact that the minister is the representative of the independent sovereign or state which sends him, and sends him upon the faith of his being admittedly clothed with the same independence of, and superiority to, all adverse jurisdiction as the sovereign authority whom he represents (*The Parlement Belge*, *supra*), or upon the personal inviolability which is accorded him for practical reasons, either or both of these reasons must underlie the fiction of exterritoriality by which the privilege is commonly explained. For an attempt to distinguish inviolability and exterritoriality, see Halleck, International Law, 4th ed., i., 358.

(*a*) Grotius, ii., xviii. 4, 5; Phillimore, International Law, ii., 195; Wheaton, International Law, 4th English ed., s. 225 a. The older English text-writers were of a contrary opinion, founding it upon a distinction between *mala prohibita* and *malu in se* (which they applied both to criminal and to civil liability, holding that a minister might be liable upon a contract which was valid *jure gentium*). See 4 Co. Inst. 153; Com. Dig. tit. Ambassador; 1 Hale, P. C. 99. 1 Bl. Com. 253 pronounces in favour of complete immunity. There is no modern English authority on the subject.

(*b*) See the Case of Lesley, Bishop of Ross (1571), Camden, Armates, ed, 1717, ii., 237; Somers' Tracts (Scott), i., 186; Phillimore, International Law, ii., 203; Froude, History of England, x., 297; Ward, History of Law of Nations, i., 486; and, for a discussion of the influence of the doctrine of sovereignty as understood at the time, Hill, History of European Diplomacy, ii., 515.

(*c*) Mendoza's Case, Camden, Armates, ed. 1717, iii., 413; Zouch, Solutio Quæstionis, 130.

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house may be searched and his papers seized (*d*). If his crimes be such as to render him amenable to the local jurisdiction, it must be because he has forfeited the privileges annexed to his diplomatic character (*e*).

Freedom from legal process.

661. All writs and processes whereby the person of a public minister, authorised and received as such, may be arrested or imprisoned, or his goods distrained, seized, or attached, are null and void (*f*).

The immunity is not forfeited in the case of a public minister (as it may be in the case of members of his suite or household (*g*)) by his engaging in trade (*h*). A secretary of legation authorised to act

(*d*) Gyllenbourg's Case (1717), Martens, Causes Célèbres, i., 97.

(*e*) Wheaton, International Law, 4th English ed., s. 98.

(*f*) The Diplomatic Privileges Act, 1708 (7 Ann. c. 12), s. 4, provides for the punishment of all persons and their attorneys and solicitors who take any proceedings in contravention of the Act. The immunity conferred by the statute, while professing merely to secure the persons and property of public ministers against the process of the courts, does in fact confer upon them complete freedom from interference. Thus, the exterritoriality or inviolability of a public minister's house—as to the extent of which writers on international law differ considerably—is safeguarded by the fact that the minister is not amenable to the jurisdiction of the courts in respect of his actions. The right to freedom of religious worship (*droit de chapelle*) is hardly likely ever to be called in question. The right of a public minister to exercise jurisdiction over the inmates of his house is not recognised in English law, so that where one of them becomes amenable to the local jurisdiction he must be surrendered to the local authorities. See the case of Mr. Gallatin's coachman, where the right to arrest within the embassy of the United States in London was claimed, although it was admitted that notice of the intention to effect an arrest should be given, as a matter of courtesy, in order that the offender might either be voluntarily handed over or might be arrested at a time convenient to the minister (Hall, International Law, 5th ed., 180; Halleck, International Law, 4th ed., i., 375). Where a foreigner was enticed into the embassy of the State of which he was a subject and detained there against his will, the Secretary of State for Foreign Affairs ordered his release, if necessary by force; see the Case of Sun-Yat-Sen, Halleck, International Law, 4th ed., i., 376. It follows from these cases that the English law does not recognise any right of asylum as attaching to a foreign embassy. See, too, Forsyth, Cases and Opinions on Constitutional Law, 217, as to the duty of a British public minister abroad to deliver up offenders to the local authorities, even if they be members of his establishment. A public minister's immunity as regards rates and taxes, although deducible from the general principles as to his freedom from taxation which are sanctioned by international usage, is sufficiently safeguarded in English law by the fact that no action can be brought against him to enforce payment (*Parkinson* v. *Potter* (1885), 16 Q. B. D. 152). It is usual for the Treasury to make an allowance to the rating authority of the district in which the immune premises are situate, in order to lessen the loss to the rates by reason of the immunity. See, generally, title RATES AND RATING. The English authorities are silent on the subject of his liability to pay customs duties and similar imposts. The subject is discussed generally by Halleck, *supra*, i., 385.

(*g*) See p. 432, *post*.

(*h*) *Barbuit's Case* (1737), Cas. *temp.* Talb. 281. In *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94, it was held that no action would lie against an envoy extraordinary and minister plenipotentiary in respect of calls on shares. Where there is a joint liability with persons who are not of a diplomatic character, it is doubtful whether the privilege could be supported (*Taylor* v. *Best* (1854), 14 C. B. 487). Compare *Gladstone* v. *Musurus Bey* (1862), 1 Hem. & M. 495, where securities were deposited with a bank in the name of the Turkish ambassador in London subject to forfeiture in certain events, and the court declined to entertain any jurisdiction against the ambassador himself, but

as *chargé d'affaires* in the absence of his ambassador is within the privilege, and cannot be sued in respect of a mercantile contract (*i*). The immunity prevails not only during the period for which the minister is accredited, but also for such reasonable time after his recall as will enable him to make the necessary arrangements for his departure (*k*). It ceases at his death (*l*).

A British subject, appointed by a foreign Government as the representative of such Government and received by the British Government in that capacity without reservation, is entitled to the privilege (*m*).

Whether process issued by the courts of this country can be served in a foreign country upon a foreign minister accredited to and received at the court of such foreign country must be taken to be doubtful (*n*).

662. The privilege may be waived (*o*), as by appearing and pleading otherwise than to the jurisdiction (*p*), or by bringing an action, in which case the court may order the plaintiff to give security for costs (*q*). Whether the courts will entertain a counter-claim to an action brought by a minister is uncertain (*r*). A public minister cannot be compelled to give evidence in a court of justice against his will, inasmuch as he is not bound to obey a subpœna (*s*). Waiver of privilege.

granted an injunction against the bank until the hearing. See, generally, title ACTION, Vol. I., at p. 19.

(*i*) *Taylor* v. *Best* (1854), 14 C. B. 487.

(*k*) *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94; *Musurus Bey* v. *Gadban*, [1894] 2 Q. B. 352, C. A. The Statute of Limitations does not begin to run until after the expiration of such period (*Musurus Bey* v. *Gadban*, *supra*). Where a public minister has been dismissed, he cannot claim the privilege, although he has not received an official notification of his dismissal (*Marshall* v. *Critico* (1808), 9 East, 447).

(*l*) So that his estate is subject to legacy duty (*A.-G.* v. *Kent* (1862), 1 H. & C. 12).

(*m*) *Macartney* v. *Garbutt* (1890), 24 Q. B. D. 368; but the privilege does not attach where the appointment was not *bonâ fide*, but was made for the purpose of protecting a person against his creditors (*Re Cloete, Ex parte Cloete* (1891), 65 L. T. 102, C. A., *per* Lord ESHER, M.R., at p. 103).

(*n*) *New Chile Gold Mining Co.* v. *Blanco* (1888), 4 T. L. R. 346. The courts, in the exercise of their judicial discretion, will hesitate to allow service out of the jurisdiction in such a case, and in this instance leave was refused on the ground that the court did not consider it right to allow a foreign minister to be sued in the courts of this country, at all events upon a cause of action not arising in this country.

(*o*) It seems to have been thought at one time that a public minister could not by any act of his own waive his privilege, which is attached to his office in the interests of the Sovereign whom he represents (*Barbuit's Case* (1737), Cas. *temp.* Talb. 281).

(*p*) *Taylor* v. *Best*, *supra*; *Barbuit's Case*, *supra*.

(*q*) This, it is submitted, follows from the decision in *Brazil* (*Emperor*) v. *Robinson* (1838), 6 Ad. & El. 801, so that *Montellano* (*Duke*) v. *Christin* (1816), 5 M. & S. 503, would not now be followed.

(*r*) Dicey, Conflict of Laws, 2nd ed., 199; and see and compare *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487, C. A; [1898] 1 Ch. 190.

(*s*) Diplomatic Privileges Act, 1708 (7 Ann. c. 12), s. 3; Halleck, International Law, 4th ed., i., 380. See the case of the Neapolitan minister referred to in Foote, Private International Jurisprudence, 168.

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Privilege of family and household.

663. The immunities of a diplomatic agent are extended to his family living with him, because of their relationship to him; to secretaries and attachés, whether civil or military, forming part of the mission, but not personally accredited, because of their necessity to him in his official relations; and to domestics and other persons in his service not possessing a diplomatic character, because of their necessity to his dignity or comfort (*t*). The privilege is that of the minister himself, and only attaches to them so far as it is necessary for his convenience (*a*).

The family is generally said to be restricted to the minister's wife and children (*b*). It is not sufficient in order that the privilege may attach that the person claiming it should be an inmate of the minister's house (*c*).

Ambassador's suite.

664. The suite consists, according to the British practice, of a councillor of embassy, a first, second, and third secretary, and attachés, civil and military, varying in number according to the importance of the particular diplomatic post. Commercial attachés are also stationed at certain diplomatic centres. Persons other than the permanent members of a minister's suite may possess a diplomatic character and enjoy immunities granted to them as diplomatic persons, although only appointed to conduct a particular negotiation. Such a person, acting with and under the direction of the embassy of his country in England, is within the privilege (*d*), as is also a consul-general (*e*) acting as an attaché (*f*).

The household.

665. The members of the household of a minister are not capable of enumeration. The privilege, being that of the minister, will attach in all cases where it is necessary for his interest or convenience, so that it is a question of fact in each case whether the nature of the office or employment is sufficient to afford protection (*g*). Accordingly, messengers and couriers are said to be entitled to safe conduct and to freedom from interference with their persons or despatches (*h*). The reference to domestic servants in the Diplomatic Privileges Act, 1708 (*i*), is merely by way of example, the privilege being extended to all persons associated in the performance of the duties of the embassy (*k*).

(*t*) Hall, International Law, 178.

(*a*) Diplomatic Privileges Act, 1708 (7 Ann. c. 12), s. 3; *Novello* v. *Toogood* (1823), 1 B. & C. 554; *Fisher* v. *Begrez* (1832), 1 Cr. & M. 117; *Taylor* v. *Best* (1854), 14 C. B. 487; *Parkinson* v. *Potter* (1885), 16 Q. B. D. 152.

(*b*) Halleck, International Law, 4th ed., i., 354.

(*c*) See the *Case of Don Pantaleone Sa* (1653), the brother of the Portuguese ambassador in London and his destined successor, who was delivered up to the British authorities, tried for murder, and executed (Zouch, Solutio Quæstionis; Somers' Tracts, vi., 253; Ward, History of the Law of Nations, ii., 537; 5 State Tr. 461; and see note (*f*) on p. 430, *ante*.

(*d*) *Service* v. *Castaneda* (1845), 2 Coll. 56.

(*e*) See pp. 434 *et seq.*, *post*.

(*f*) *Parkinson* v. *Potter*, *supra*.

(*g*) *Seacomb* v. *Bowlney* (1743), 1 Wils. 20.

(*h*) There is no express authority as to this in English law.

(*i*) 7 Ann. c. 12, s. 3. See note (*f*) on p. 430, *ante*.

(*k*) *Parkinson* v. *Potter*, *supra*.

Thus a secretary (*l*) is privileged from arrest, and a chorister may be entitled to the privilege (*m*). A chaplain is not protected if he does no duty in the house (*n*); a person employed as housekeeper may be protected provided that sufficient evidence be produced of the nature of the employment (*o*).

The evidence necessary to establish a claim to protection must disclose actual service (*p*) at the time of arrest or execution (*q*). The service must be *bonâ fide* and not colourable (*r*), and is not confined to persons residing in the minister's house (*a*).

Forfeiture of privilege.

666. The privilege, which is absolute in the case of a minister himself (*b*), is forfeited in the case of a member of his establishment if such a person engages in trade (*c*). And, although the goods of a privileged person are expressly exempted from seizure (*d*), the exemption will not be supported in cases where the reason for it does not apply, as in the case of goods which are clearly not for the convenience of the claimant, and cannot therefore be necessary for that of the minister (*e*).

Diplomatic Privileges Act, 1708.

667. It is usual for a list of persons attached to an embassy to be furnished to the Secretary of State for Foreign Affairs, but inclusion in the list is not a condition precedent to the right to claim the privilege. The provision whereby the names of such persons are to be registered at the office of a principal Secretary of State, and by him transmitted to the sheriffs of London and Middlesex for publication (*f*), is only directed to the penal clause of the Act, which provides for the punishment of persons who prosecute writs or processes against such persons as fall within the protection of the Act (*g*).

For the purposes of privilege there is no distinction between foreigners and British subjects (*h*).

It is doubtful how far the privilege would be extended to the family of the servant of a public minister (*i*).

(*l*) *Hopkins* v. *De Robeck* (1789), 3 Term Rep. 79; *Darling* v. *Atkins* (1769), 3 Wils. 33. In the latter case the claimant was a British subject.

(*m*) *Fisher* v. *Begrez* (1832), 1 Cr. & M. 117.

(*n*) *Seacomb* v. *Bowlney* (1743), 1 Wils. 20.

(*o*) *Delvalle* v. *Plomer* (1811), 3 Camp. 47.

(*p*) *Crosse* v. *Talbot* (1724), 8 Mod. Rep. 288; *Wedmore* v. *Alvarez* (1730), 2 Stra. 797; *Seacomb* v. *Bowlney*, *supra*; *Masters* v. *Manby* (1757), 1 Burr. 401; *Lockwood* v. *Coysgarne* (1765), 3 Burr. 1676.

(*q*) *Heathfield* v. *Chilton* (1767), 4 Burr. 2015.

(*r*) *Masters* v. *Manby*, *supra*; *Darling* v. *Atkins*, *supra*; *Delvalle* v. *Plomer*, *supra*; *Parkinson* v. *Potter*, *supra*; *Re Cloete*, *Ex parte Cloete* (1891), 65 L. T. 102.

(*a*) *Evans* v. *Higgs* (1727), 2 Stra. 797; *Wedmore* v. *Alvarez*, *supra*; *Carolino's Case* (1744), 1 Wils. 78; *Fisher* v. *Begrez*, *supra*.

(*b*) *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 E. & E. 94.

(*c*) Diplomatic Privileges Act, 1708 (7 Ann. c. 12), s. 5.

(*d*) *Ibid.*, s. 3.

(*e*) *Novello* v. *Toogood* (1823), 1 B. & C. 554.

(*f*) Diplomatic Privileges Act, 1708 (7 Ann. c. 12), s. 5.

(*g*) *Fisher* v. *Begrez* (1832), 1 Cr. & M. 117; *Hopkins* v. *De Robeck* (1789), 3 Term Rep. 79; *Delvalle* v. *Plomer* (1811), 3 Camp. 47.

(*h*) *Darling* v. *Atkins* (1769), 3 Wils. 33; compare *Re Cloete*, *Ex parte Cloete*, *supra*, *per* BRETT, M.R., at p. 103.

(*i*) In *English* v. *Caballero* (1823), 3 Dow. & Ry. (K. B.) 25, the wife of the second

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(2) *The Consular Service.*

Consular service.

668. The consular service is subordinate to the diplomatic service, the diplomatic representative in the country in which a consular officer is stationed being invested with authority over him, subject to the control of the Secretary of State for Foreign Affairs (*k*). A consular officer should carry out instructions received from the diplomatic representative, if not inconsistent with general instructions from the Foreign Office. In case of such inconsistency he must ask for fresh instructions from the diplomatic representative, and if the original instruction be then maintained, he must obey it. He may subsequently make a representation to the Secretary of State (*l*).

Classification.

669. The service is divided into two classes (*m*):—(1) The salaried service, consisting of officers who have entered the career and are restricted from trading (*n*). It is divided into the general consular service; the consular service for the Ottoman dominions, Persia, Greece, and Morocco; and the consular service for China, Corea, Japan, and Siam (*o*). (2) Officers who are not in the career, and who, with few exceptions, receive no salary. They are allowed to accept consular posts on the understanding that they devote adequate time and attention to their duties, independently of other pursuits (*p*).

The ranks in the service are (*q*)—agent and consul-general; consul-general; consul; vice-consul; consular agent; and pro-consul.

Appointment.

670. Agents and consuls-general, consuls-general, consuls, and, in some instances, vice-consuls are appointed by commission from the Crown, and are described as "His Britannic Majesty's" agent and consul-general, etc. (*r*).

secretary in the Spanish Embassy was arrested alone on a bill issued against husband and wife. A rule was obtained, but discharged on the ground of insufficient evidence as to the husband's position, and nothing appears in the judgments as to the wife's position, but it appears to have been assumed that, if the husband could establish privilege, the wife could not be arrested. For the liability of an inmate of an embassy to arrest on a criminal charge, see note (*f*), p. 430, *ante*.

(*k*) British Consular Instructions, 1907 (issued by the Foreign Office), v., s. 2. The expression "consular officer" is defined by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (20), as including consul-general, consul, vice-consul, consular agent, and any person for the time authorised to discharge the duties of consul-general, consul, or vice-consul.

(*l*) *Ibid.*

(*m*) *Ibid.*, i., s. 1.

(*n*) See *ibid.*, xii., "Restrictions as to Extra-official Employment, Speculations, and Requests for Favours." Consular officers who are restricted from trading are in certain cases allowed to act as agents to Lloyd's and to steam navigation companies. The special sanction of the Secretary of State is necessary (*ibid.*, xii., 1).

(*o*) *Ibid.*, i., s. 1 (a). The position of consuls in Eastern and non-Christian States is regulated by special treaties and agreements, see Halleck, International Law, 4th ed., i., 415. The salaried services are divided into four classes (Consular Instructions, i., s. 2)

(*p*) *Ibid*, i., s. 1 (b).

(*q*) *Ibid.* For regulations as to precedence, see *ibid.*, ii.

(*r*) *Ibid.*, i., s. 7.

671. Vice-consuls not appointed by commission, consular agents, and pro-consuls are appointed by letter of authority issued, with the sanction of the Secretary of State, by a consular officer whose commission authorises him to make such appointments. They are described as "British" vice-consul, etc. (*s*).

Recognition.

672. A consular officer has no power to act until recognised by the authorities of the country in which he is to act, except in the case of pro-consuls, who require no recognition (*t*). The usual method of recognition is by *exequatur*, granted by the Sovereign or chief authority of the country in which the consular officer is appointed to reside. It is obtained on the application of the diplomatic representative, to whom the commission is as a rule transmitted direct by the Secretary of State. If there is no diplomatic representative, a consul-general or consul forwards his commission to the proper authority, and himself applies for an *exequatur* (*a*).

Powers and duties.

673. The general powers and duties of consular officers may be summarised as follows:—They must not betray confidence reposed in them in their official capacity (*b*). They must furnish information on any subject required by His Majesty's Government, independently of the special matters mentioned in the Consular and Board of Trade Instructions (*c*). They must not correspond directly with the central Government of the country in which they reside, except in countries in which no diplomatic representative is stationed through whom they can make representations (*d*). They may correspond with local authorities only, and vice-consuls and consular agents are instructed to abstain from such correspondence as far as possible (*e*). They may make tours of inspection in their districts, but must first apply to the Secretary of State for the requisite authority, and must duly notify the diplomatic representative (*f*). They have duties in connection

(*s*) Consular Instructions, i., s. 7.

(*t*) *Ibid.*, i., s. 8.

(*a*) *Ibid.*, i., s. 9. Recognition of vice-consuls not holding royal commissions and of consular agents is usually given in a less formal manner than by exequatur (*ibid.* i., s. 10).

(*b*) *Ibid.*, v., s. 1. Disobedience renders them liable to dismissal and also to the penalties under the Official Secrets Act, 1889 (52 & 53 Vict. c. 52), s. 2.

(*c*) *Ibid.*, v., 11. The ordinary returns to be furnished (see *ibid.*, annexe to chap. v.) are—(a) to the Foreign Office:—Annually: (1) certified copies of entries of marriages; (2) list of vice-consuls, consular agents, and pro-consuls; (3) list of Government property; (4) list of Government books; (5) report on condition of Government house; (6) commercial report; (7) statement from salaried officers of extra remuneration or emolument. Quarterly: (8) life certificate (not required from unsalaried officers, unless the office allowance is paid to an agent in England); (9) account current, with fee returns; (10) acknowledgment of despatches and circulars received. (b) To the Registrar-General, Somerset House, annually, certified copies of entries of births and deaths. (c) To the Board of Trade, annually, British shipping; see also the detailed instructions in chap. xvii. as to furnishing of information with regard to trade and commerce. (d) To the Board of Agriculture, monthly, report on health of cattle etc.

(*d*) *Ibid.*, v., s. 13.

(*e*) *Ibid.*, v., s. 14.

(*f*) *Ibid.*, v., s. 28.

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with the support of churches, chapels, hospitals, and burial grounds (*g*).

It is their duty to transmit to the Secretary of State, and also to His Majesty's naval and military officers when it may be advantageous so to do, such correct intelligence as can be procured respecting the arming, equipment, and sailing of any public or private armed vessel belonging to enemies of His Majesty (*h*).

Judicial powers.

They are invested with jurisdiction to act as judges in the consular courts of numerous Eastern countries and in certain colonies and protectorates (*i*).

Duties as to naval matters.

They have duties in connection with rendering advice and assistance to the commanding officers of His Majesty's ships visiting their district (*k*), the purchase of supplies (*l*), and the settlement of claims for pilotage (*m*), as well as with regard to the recovery of wreckage and articles lost from the King's ships (*n*), the recovery of deserters or stragglers (*o*), and naval funeral expenses (*p*). They also have to perform duties with regard to ceremonial visits to foreign warships (*q*).

Duties as to mercantile marine etc.

In connection with the mercantile marine, consular officers, in addition to their duties under the Merchant Shipping Acts, 1894(*r*) and 1906 (*s*), have duties with regard to supporting the masters of British ships in maintaining discipline (*t*) and in furnishing yearly returns of British and of foreign shipping visiting the ports over which they have jurisdiction (*a*), as well as in communicating with Lloyd's agents (*b*), and in issuing or indorsing bills of health (*c*). They have also duties in connection with quarantine and cattle diseases (*d*) and with the suppression of the slave trade (*e*).

Assistance to British subjects.

In the case of British subjects visiting the place at which he resides, a consular officer must give advice and assistance generally(*f*). He must uphold their rightful interests (*g*), referring,

(*g*) Under the Consular Allowances Act, 1825 (6 Geo. 4, c. 87), ss. 10—15 of which are preserved by the Consular Salaries and Fees Act, 1891 (54 & 55 Vict. c. 36).

(*h*) Consular Instructions, v., s. 34. A consular officer has also the authority of a justice of the peace in relation to the attestation of soldiers for enlistment (Army (Annual) Act, 1881 (44 & 45 Vict. c. 58), s. 94 (1)).

(*i*) See p. 423, *ante*.

(*k*) Consular Instructions, xviii., s. 2.

(*l*) *Ibid.*, s. 5.

(*m*) *Ibid.*, ss. 7, 8.

(*n*) *Ibid.*, s. 11.

(*o*) *Ibid.*, s. 12.

(*p*) *Ibid.*, s. 13.

(*q*) *Ibid.*, s. 3. For the King's regulations with reference to visits of ceremony, see the annex to chap. xviii.

(*r*) 57 & 58 Vict. c. 60.

(*s*) 6 Edw. 7, c. 48. See title SHIPPING AND NAVIGATION.

(*t*) Consular Instructions, xix., s. 5.

(*a*) *Ibid.*, s. 7.

(*b*) *Ibid.*, s. 9.

(*c*) *Ibid.*, s. 8.

(*d*) *Ibid.*, xx.

(*e*) *Ibid.*, xxi.

(*f*) *Ibid.*, xxii., Part I., s. 1.

(*g*) *Ibid.*, s. 2.

if necessary, to the diplomatic representative (*h*), and in any case of a serious nature affecting British subjects furnishing a full statement of the facts to the home Government (*i*). He must also assist British subjects who are prosecuting claims against foreign Governments both with regard to establishing their nationality and to preparing evidence by which to support them (*k*). He also has duties with regard to the repatriation of distressed British subjects (*l*), and to the care of the property of British subjects and of deceased British subjects (*m*).

Registers to be kept.

It is the duty of a consular officer (*n*) to keep a register (*o*) of all British subjects within his district, as well as of all persons under the protection of Great Britain (*p*). For this purpose it is his duty to inquire into the claims of persons claiming British nationality (*q*).

He must keep a register for births and a register for deaths of British subjects occurring in his district (*r*), and must forward to the Registrar-General annually a certified copy of each entry in the registers (*s*).

He may be empowered to solemnise marriages (*t*), and has authority to issue passports to British subjects (*a*), and, whenever local regulations require it, to countersign passports carried by British subjects by way of authentication (*b*).

Arrest of criminals.

Extradition is generally dealt with through the diplomatic channel (*c*). Consular officers are, however, at times required to apply to the local authorities for the provisional arrest of criminals, pending the formal application for their surrender (*d*). Such application should only be made on receipt of instructions from the Foreign Office or at the request of the governor of a colony (*e*).

(*h*) Consular Instructions, xxii., s. 3.
(*i*) *Ibid.*, s. 8.
(*k*) *Ibid.*, xxii., Part II.
(*l*) *Ibid.*, xxiii.
(*m*) *Ibid.*, xxiv.
(*n*) A register is to be kept at all consulates-general and consulates, and at such vice-consulates and consular agencies as may be directed (*ibid.*, xxvii., s. 1).
(*o*) The instructions contained in chap. xxvii. of the Consular Instructions are primarily addressed to consular officers in countries where registration is voluntary, but they should be followed in countries where registration is rendered compulsory by Order in Council under the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), except so far as they are inconsistent (Consular Instructions, xxvii., p. 261).
(*p*) *Ibid.*, xxvii., s. 7.
(*q*) The regulations for ascertaining British nationality are contained in the Consular Instructions, chap. xxvii., and also in chap. xxv., "Naturalization." A consular officer has some duties in connection with the Naturalization Acts, particularly with regard to declarations of alienage under s. 3 of the Naturalization Act, 1870 (33 Vict. c. 14) (Consular Instructions, xxv., 5).
(*r*) *Ibid.*, xxxi., s. 1.
(*s*) *Ibid.*, xxxi., s. 2.
(*t*) *Ibid.*, xxx., and see titles CONFLICT OF LAWS, at p. 259, *ante*; HUSBAND AND WIFE.
(*a*) Consular Instructions, xxvi.
(*b*) *Ibid.*, s. 8.
(*c*) *Ibid.*, xxviii., s. 1.
(*d*) *Ibid.*, s. 2.
(*e*) *Ibid.*, s. 3.

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Except at certain ports in France, Germany, Belgium, and the Netherlands, where the direct request of the Commissioner of Metropolitan Police is sufficient authority for making an application for provisional arrest (*f*), a consular officer should not act on the application of police authorities in the United Kingdom and the British colonies (*g*).

Consular officers (*h*) may administer oaths and take any affidavit, and also do any notarial act which any notary public can do within the United Kingdom (*i*).

Salaries.

674. Consular salaries and fees are now regulated by Orders in Council made by statutory authority (*k*).

Domicil.

675. Residence in a foreign country as a consular officer gives rise to no inference of domicil in that country (*l*).

A British consular officer residing abroad is not liable to give security for costs as plaintiff in an action in England on the ground that he resides out of the jurisdiction (*m*).

Privileges of consular officers.

676. A consular officer is not a public minister (*n*), and is not, therefore, *eo nomine* entitled to the privileges accorded to persons of a diplomatic character (*o*). Where diplomatic and consular offices are united in the same person, as in the case of a consul-general appointed to act as attaché to a legation, the diplomatic character will be recognised (*p*).

(*f*) Consular Instructions, xxiii., s. 4.

(*g*) *Ibid.*, s. 3.

(*h*) Namely, consuls-general, consuls, vice-consuls, acting consuls, pro-consuls, and consular agents (Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 6 (1)); acting consuls-general, acting vice-consuls, and acting consular agents (Commissioners for Oaths Act, 1891 (54 & 55 Vict. c. 50), s. 2).

(*i*) Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 6 (1); Consular Instructions, xxix. See title EVIDENCE.

(*k*) Under the Consular Salaries and Fees Act, 1891 (54 & 55 Vict. c. 36). For tables of consular and marriage fees, see Consular Instructions, annex to chap. ix.

(*l*) *Sharpe* v. *Crispin* (1869), L. R. 1 P. & D. 611. For an instance of a foreign diplomat held on the facts to be domiciled in England, see *Heath* v. *Samson* (1851), 14 Beav. 441. See, too, *A.-G.* v. *Kent* (1862), 1 H. & C. 12. See title CONFLICT OF LAWS, at p. 188, *ante*.

(*m*) *Colebrook* v. *Jones* (1751), Dick. 154. The exemption is not founded upon any presumption of domicil, but upon the analogy of naval and military officers in the service of the Crown, as to whom see *Nugent* (*Lord*) v. *Harcourt* (1834), 2 Dowl. 578; *Evelyn* v. *Chippendale* (1839), 9 Sim. 497, also reported *sub nom. Evering* v. *Chiffenden*, 7 Dowl. 536. In *Plowden* v. *Campbell* (1854), 23 L. J. (Q. B.) 384, a plaintiff in the service of the East India Company as a civil and sessions judge was held not to be exempt. Compare *Stanley* v. *Hume* (1817), 1 Hog. 12.

(*n*) *Clarke* v. *Crelico* (1808), 1 Taunt. 106; *Heathfield* v. *Chilton* (1767), 4 Burr. 2017. A consular officer is appointed, not to transact affairs between State and State, but to assist the subjects of the State which he represents in matters of commerce (*Barbuit's Case* (1737), Cas. *temp.* Talb. 281; *Viveash* v. *Becker* (1843), 3 M. & S. 284). He is himself liable to be sued in the courts of this country in the same manner as any other merchant in respect of mercantile transactions in which he may engage (*The Indian Chief* (1800), 3 Ch. Rob. 26, at p. 27).

(*o*) *Viveash* v. *Becker*, *supra*.

(*p*) *Parkinson* v. *Potter* (1885), 16 Q. B. D. 152

Consular officers are accorded some degree of freedom from personal interference, by virtue of their office, in order that they may not be unduly hampered in the discharge of their duties (*q*).

(3) *Passports.*

Passports.

677. Passports may be granted by the Crown at any time, to enable British subjects to travel with safety in foreign countries (*r*), but such passports would clearly not be available so as to permit travel in an enemy's country during war (*s*). Passports are issued by the Foreign Office or by diplomatic officers abroad, and when granted in England are subject to a stamp duty of sixpence (*t*).

Violation of a passport is a grave breach of international law, and in England is punishable by fine and imprisonment at common law (*u*). A conspiracy to obtain a passport by false or fraudulent representations under circumstances tending to produce a public mischief has been held to constitute an indictable offence (*x*).

SUB-SECT. 3.—*Treaties.*

Treaties.

678. Treaties or contracts between nation and nation, which are also known under the name of conventions, declarations, protocols, or general acts (*y*), are usually agreed upon by agents

(*q*) This is recognised in general terms in *Viveash* v. *Becker* (1843), 3 M. & S. 284, at p. 298. Writers on international law are by no means clear as to the extent of the privileges accorded to consular officers, but it may be taken to be generally recognised that they are entitled to safe conduct (*Viveash* v. *Becker*, *supra*), and that official documents relating to their consular duties are inviolable. A claim to immunity from taxation is put forward by many writers, but there is no direct authority in English law as to this. It is submitted that violations of the freedom of a consular officer in the discharge of his duties are a matter for adjustment between the Governments concerned (*Viveash* v. *Becker*, *supra*; Hall, International Law, p. 320). For a full discussion of consular privileges by a modern writer, see Halleck, International Law, 4th ed., i., pp. 403 *et seq.*

(*r*) In some foreign countries, *e.g.*, Russia, passports are always required by the authorities to enable a person to enter the country.

(*s*) In time of war the passport granted by the authorities of a neutral State is in the form of a request to either of the belligerents to protect the person and property of a subject of the neutral State. In the case of a ship it is a requisition to permit the ship, passengers, and cargo to pass without molestation by the belligerents.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.

(*u*) Such an offence would clearly be an act involving public mischief, and acts involving public mischief are indictable misdemeanours. See *R.* v. *Brailsford*, [1905] 2 K. B. 730, 739, 747.

(*x*) *R.* v. *Brailsford*, *supra*. In view of this case it must not be assumed that obtaining a passport by false declarations is not an offence apart from conspiracy (see *ibid.*, *per* Lord ALVERSTONE, C.J., at p. 737). This case applied to a passport for travel in Russia, but the principle would also apply, it is apprehended, to passports granted by the Crown to subjects of an enemy's country to enable them to travel in England.

(*y*) Commercial treaties are sometimes known as conventions. Protocol (from the Greek πρῶτος and κόλλα) was a term originally applied to the notes or drafts taken down in an ecclesiastical cause (see Phill. Eccl. Law, 1st ed., p. 1243). In diplomacy it was applied to the minutes of deliberations or the rough draft of a treaty or other document, whence the word came to be applied to the treaty itself, or the actual result of the conference or deliberations (see Skeat, Etym. Dict., p. 472; Halleck, International Law, 4th ed., p. 298; Calvo,

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appointed by the treaty-making authority in either State, the English agents for such purposes being appointed by the Crown (*z*).

Plenipotentiaries.

Where plenipotentiaries, or agents invested with full and unlimited powers, are appointed, the terms of the treaty as agreed upon by such agents are invariably (though not necessarily, it seems) reduced into writing and signed and sealed by them, when the treaty becomes binding in general (*a*), though subsequent ratification by the sovereign power (*b*) is usual. Where the agents are acting under a limited authority, the agreements come to are usually termed sponsions, and must be either tacitly or explicitly ratified by the sovereign power in the respective States (*c*).

The Great Seal of the United Kingdom is to be used for sealing all treaties with foreign princes and States (*d*).

Parliamentary sanction to treaties.

679. Treaties thus concluded are in general binding upon the subject without express parliamentary sanction; but the previous consent of, or subsequent ratification by, the legislature is legally necessary to their validity in certain cases (*e*).

Thus, though treaties relating to war and peace, the cession of territory, or concluding alliances with foreign powers are generally

Droit International, 5th ed., tome 1, p. 651). For an example of a general Act, which is a term applied to an agreement come to at a conference of agents appointed by several powers, see the General Act of the Berlin Conference of 1885 (Hertslet's Comm. Treat., Vol. XVII., p. 62). For an example of a declaration, see the Declaration of Paris, 1856 (*ibid.*, Vol. X., p. 547). Treaties for purposes of mutual defence or the preservation of peace are also known as leagues or alliances.

(*z*) The power of making treaties belongs to every sovereign State, in so far as it is not restricted by treaty or agreement with foreign nations; but in non-sovereign or dependent states the power is either limited in extent or non-existent. Thus the various States of the American Union, or of the Dominion of Canada or Australia, have no treaty-making power, and the various Indian States and protectorates generally cannot make treaties; see title DEPENDENCIES AND COLONIES. The instrument conferring the power is customarily passed under the Great Seal on the authority of a sign manual warrant countersigned by the Secretary of State for Foreign Affairs (Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., p. 53).

(*a*) See Wheaton, International Law, 4th English ed., p. 366.

(*b*) By the rules of international law it is essential to the goodness of a treaty or league that it be made by the sovereign power in a state (Puffendorf, Law of Nature, lib. 2, c. 17). The authority in whom the treaty-making power is vested in any State depends upon the fundamental or constitutional law of that particular State. In England the sovereign power is vested in the Crown *quoad hoc* in the manner stated in the text (see 1 Bl. Com., 14th ed., 256). But see note (*i*), p. 441, *post*, as to the necessity for confirmation by the legislature in certain cases.

(*c*) See Wheaton, International Law, 4th English ed., p. 365.

(*d*) Union with Scotland Act, 1706 (6 Ann. c. 11; 5 & 6 Ann. c. 8, Ruff.), art. 24.

(*e*) By the rules of international law the treaty is imperfect in its obligation if it requires some further ceremony, such as the consent of the legislature, to make it binding upon the contracting nation according to the fundamental or constitutional law of that particular nation. In England there is no codified list of subjects upon which the Crown has power to bind the subject by treaty without parliamentary sanction. But where any reasonable doubt arises, it is usual either to obtain statutory authority beforehand, or to stipulate in the treaty that the consent of the legislature shall be obtained (see Wheaton, International Law, ed. 1864, p. 457).

conceded to be binding upon the nation without express parliamentary sanction (*f*), it is deemed safer to obtain such sanction in the case of an important cession of territory (*g*). And where taxation is imposed or a grant from the public funds rendered necessary, or where the existing laws of trade and navigation are affected (*h*), or where the private rights of the subject are interfered with by a treaty concluded in time of peace, it is apprehended that the previous or subsequent consent of Parliament is in all cases required to render the treaty binding upon the subject and enforceable by officers of the Crown (*i*). But where the treaty is

(*f*) See Kent's Com. on American Law, 1873 ed., Vol. I., p. 166; *The Elsebe* (1804), 5 Ch. Rob. 174, 181; *The Parlement Belge* (1879), 4 P. D. 129, 139, 149—151. In the case of the Crown descending to any person not being a native of England, the consent of Parliament is required before this nation can be obliged to engage in any war for the defence of any territories not belonging to the Crown of England (Act of Settlement, 1700 (12 & 13 Will. 3, c. 2)).

(*g*) Thus, statutory assent was obtained to the agreement for the cession of the island of Heligoland to the German Empire in 1890 (see the Anglo-German Agreement Act, 1890 (53 & 54 Vict. c. 32)). In the case of *Damodhar Gordhan* v. *Deoram Kanji* (1876), 1 App. Cas. 332, it appeared that it had been held by the judges of the High Court of Bombay that it was beyond the power of the Crown without the concurrence of the Imperial Parliament to make any cession of territory within the jurisdiction of any of the British courts in India, in time of peace, to a foreign power. The Privy Council did not decide whether this ruling was right, but expressed grave doubts as to its soundness (see *ibid.*, *per curiam*, at pp. 373, 374).

(*h*) For examples of such enactments, see the statute 22 Geo. 3, c. 46, repealed by the Statute Law Revision Act, 1871 (34 & 35 Vict. c. 116); Extradition Act, 1870 (33 & 34 Vict. c. 52); International Copyright Acts, 1844 and 1852 (7 & 8 Vict. c. 12 and 15 & 16 Vict. c. 12); Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), ss. 47, 66. For further instances in which Acts of Parliament were passed in order to carry out and enforce treaties, see *Walker* v. *Baird*, [1892] A. C. 491, at pp. 494, 495.

(*i*) As to treaties imposing taxation, see Wheaton, International Law, ed. 1864, p. 457; as to treaties involving interference with private rights, see *The Parlement Belge* (1879), 4 P. D. 129. The question in this case was whether the Crown had power by treaty to confer upon Belgian packet boats the status of ships of war when in British ports and thus render them immune from actions brought by a British subject. Sir R. PHILLIMORE held that the making of such a treaty was "a user of the treaty-making power of the Crown without precedent, and in principle contrary to the laws of the constitution" (*ibid.*, at p. 154). The judgment in this case was subsequently reversed by the Court of Appeal, but upon other grounds (*The Parlement Belge* (1879), 5 P. D. 197, 220, C. A.). In *Walker* v. *Baird*, *supra*, an action was brought against an officer of the Crown for acts of interference with the plaintiff's lobster fishery, and the principle involved in the defence was that the Crown could bind its subjects by treaty (at any rate when made to put an end to war or to prevent war), that it is an offence by the common law to disobey the provisions of a public treaty or *modus vivendi* of the kind in question, and that acts of the executive in enforcing obedience to such a treaty do not give a cause of action (see *ibid.*, at p. 492). The Privy Council did not give any decision as to the powers of the Crown in such cases, but held that the defendant's acts could not be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into by the Crown and a foreign power (*ibid.*, at pp. 496, 497). A convention with a foreign country as to registration of trade marks did not enable a trade mark to be registered in this country contrary to the provisions of the Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 64 (see *Re Carter Medicine Co.'s Trade Mark*, [1892] 3 Ch. 472; see also *Re Californian Fig Syrup Co.'s Trade Mark* (1888), 40 Ch. D. 620, and title TRADE MARKS). For instances where statutes were

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made to put an end to war, or, possibly, to prevent war, on public grounds and for the public safety, it is doubtful whether the sanction of Parliament would be always required (*k*). In all cases, however, the courts are competent to inquire into matters involving the construction of treaties and other acts of State; and the plea of an act of State, or that the matter involves the construction of treaties, affords no valid defence to an action against officers of the Crown for interference with the private rights of a British subject (*l*).

SUB-SECT. 4.—*Declarations of War and Peace.*

Declaration of war.

680. In order to constitute a legal state of war between this country and a foreign State there must be either a formal declaration of war by the Crown (*m*) or hostilities must have been commenced by the authority of the Crown (*n*). Thus, hostilities against a foreign State, though the whole nation joins therein,

enacted to enable the Crown to carry out and enforce treaties relating to fisheries, see 28 Geo. 3, c. 35; North American Fisheries Act, 1819 (59 Geo. 3, c. 38); 5 Geo. 4, c. 51, continued by 2 & 3 Will. 4, c. 79; 2 & 3 Vict.c. 96; 3 & 4 Vict. c. 69; 5 & 6 Vict. c. 63; Sea Fisheries Act, 1843 (6 & 7 Vict. c. 79); 18 & 19 Vict. c. 101; 31 & 32 Vict. c. 45; Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42); Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22); Oyster Cultivation (Ireland) Act, 1884 (47 & 48 Vict. c. 48); Fisheries Act, 1891 (54 & 55 Vict. c. 37); North Sea Fisheries Act, 1893 (56 & 57 Vict. c. 17). See also Hertslet's Comm. Treat., General Index, 173—180, and the authorities and opinions cited in *Walker* v. *Baird*, [1892] A. C. 491, 494, 495.

(*k*) See *Walker* v. *Baird*, *supra*, at p. 497. The point was left undecided in this case. For the authorities in favour of the Crown's right to bind the subject in such cases, see *ibid.*, at pp. 492, 493. For the authorities *contra*, see *ibid.*, at pp. 494, 495.

(*l*) *Walker* v. *Baird*, *supra*, at p. 497.

(*m*) Though, in order to notify the world that the war is undertaken by the Government, it is proper and usual that a declaration of war should precede acts of hostility, the formal declaration is, it seems, a matter of magnanimity rather than of right (see 1 Bl. Com., 14th ed., 257, 258). Declarations of war are usually transmitted through the ambassador of the foreign Government and announced to the nation by means of a proclamation. To ascertain the date of a war, the declaration transmitted through the English ambassador at the foreign court to the Foreign Office may be used in evidence (*Thelluson* v. *Cosling* (1803), 4 Esp. 266), or, it seems, the proclamation announcing the war might be used under the Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3.

(*n*) A *de facto* state of war may exist between two countries although there has been no formal declaration, provided hostilities have actually commenced (*The Teutonia* (1872), L. R. 4 P. C. 171). For the purposes of offences under the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), s. 8, a declaration of war by one of two foreign belligerents, or a declaration of neutrality by this country, is not necessary, provided hostilities have actually commenced (*United States of America* v. *Pelly*, [1899] W. N. 11). But a seizure by the Government of a foreign State intending to embark upon war with this country, but before the commencement of actual hostilities or a formal declaration of war, of goods belonging to an alien enemy does not relieve an insurer of the goods in this country of his liability under the contract of insurance (*Driefontein Consolidated Gold Mines, Ltd.* v. *Janson*, [1901] 2 K. B. 419, C. A.; see also *Nigel Gold Mining Co.* v. *Hoade*, [1901] 2 K. B. 849). But where the policy contained a warranty against "capture, seizure, and detention, and the consequences thereof," it was held otherwise (*Robinson Gold Mining Co.* v. *Alliance Insurance Co.*, [1901] 2 K. B. 919). As to the effect of such a warranty where a neutral ship was captured as prize and subsequently lost by wreck, see *Andersen* v. *Marten*, [1908] A. C. 334.

without the concurrence of the executive do not constitute a legal state of war or a legal breach of the peaceful relations existing between the two countries (*o*).

Such acts of hostility without the authority of the Crown at one time constituted treason (*p*) and are now in certain cases punishable with fine and imprisonment (*q*).

State of war.

681. When war with a foreign State has been commenced either by a formal declaration or by actual hostilities, the effect is to prohibit all commerce and intercourse between British subjects resident in British territory and the subjects of that State, or with persons residing there (*r*), and contracts entered into with such persons after war has commenced are void (*s*), whilst executory contracts entered into before the war are avoided (*t*).

(*o*) 4 Co. Inst. 152; 1 Bl. Com., 14th ed., 252, 257. Such acts, unless immediately disowned and punished by the Government, would, however, probably lead to a declaration of war by the country aggrieved.

(*p*) See the statute 2 Hen. 5, stat. 1, c. 6, repealed 20 Hen. 6, c. 11.

(*q*) Under the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), various offences relating to the fitting out of ships, expeditions etc., to be used in the service of any State at war with any friendly State are made punishable (see title CRIMINAL LAW AND PROCEDURE). By the rules of international law, as generally received, no breach of neutrality is committed by the Government of a State in permitting its subjects to fit out and *bonâ fide* sell ships of war, arms etc. to a friendly State at war with another friendly State, such ships, arms etc. being merely articles of commerce, and neutrals being permitted to carry on their commerce with belligerents subject to the risk of capture and confiscation, if contraband. Contracts, therefore, between subjects of a neutral State to export contraband goods to a belligerent (*Re Grazebrook, Ex parte Chavasse* (1865), 4 De G. J. & Sm. 655), or relating to trade with a blockaded port (*The Helen* (1865), L. R. 1 A. & E. 1), are not illegal, and may be enforced in the country in which they are made. Private persons taken in actual acts of hostility against a friendly State may, it seems, be treated as mere pirates or robbers by the latter (1 Bl. Com., 14th ed., 257), though they are sometimes handed over to their own Government for punishment. For an example of such a case, see *R.* v. *Jameson*, [1896] 2 Q. B. 425, where, however, the Government in question was under English suzerainty.

(*r*) *Barrick* v. *Buba* (1857), 2 C. B. (N. S.) 563, following *Esposito* v. *Bowden* (1857), 7 E. & B. 763, Ex. Ch.; *Potts* v. *Bell* (1800), 8 Term Rep. 548. Commerce with a person resident in the enemy's country is illegal, and the articles of commerce are liable to seizure as prize even though the commerce is transacted through a representative of the English Crown (see *Ex parte Baglehole* (1812), 18 Ves. 524, at p. 528; *Land* v. *North* (*Lord*) (1785), 4 Doug. (K. B.) 266). For a case where war was imminent, though not actually declared, see *The Teutonia* (1872), L. R. 4 P. C. 171. The shipping of cargo in a neutral vessel in an enemy's port by a British subject is illegal (*Esposito* v. *Bowden, supra; Potts* v. *Bell, supra*). But the principle of prohibition does not apply to commerce between neutrals and a belligerent (see note (*n*), p. 442, *ante*, and *Sorensen* v. *R., The Baltica* (1857), 11 Moo. P. C. C. 141), or to natural-born British subjects domiciled in a foreign country at amity with this country (*Bell* v. *Reid* (1813), 1 M. & S. 726). The subjects of a foreign State in the military occupation of the enemy are not necessarily themselves enemies, and commerce with such subjects, if permitted by the Government, is not illegal (*Hagedorn* v. *Bell* (1813), 1 M. & S. 450). See also titles ACTION, Vol. I., p. 20; ALIENS, Vol. I., p. 310.

(*s*) *Ex parte Boussmaker* (1806), 13 Ves. 71; *Willison* v. *Patteson* (1817), 7 Taunt. 439. As to rights arising in time of war, *Anthon* v. *Fisher* (1781), 2 Doug. (K. B.) 649, note. But compare *Maria* v. *Hall* (1807), 1 Taunt. 33, note. See titles ALIENS, Vol. I., p. 310; CONTRACTS.

(*t*) *Potts* v. *Bell, supra; Esposito* v. *Bowden, supra.*

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But a contract entered into by an alien enemy whilst prisoner of war and under the Crown's protection may be enforced in a proper case (*a*).

Treaty of peace.

682. As war can only be commenced so it can only be terminated by the authority of the Crown (*b*), and this is usually effected by a treaty of peace (*c*) and announced to the nation by proclamation (*d*).

SUB-SECT. 5.—*Prerogatives relating to War.*

The prerogative in time of war.

683. In time of war and in matters relating to war the Crown enjoys generally a somewhat wider latitude in the exercise of the prerogative than in time of peace, for in such matters more stringent measures than are ordinarily allowed by the common or statute law are frequently rendered necessary for the public safety or for the restoration of peace and good order. Thus, proclamations for the trial of civilians by martial law are to some extent permissible in time of war (*e*), and various prerogatives relating to the intercourse between British subjects and those of foreign countries are allowed to the Crown in time of war.

Booty.

684. Originally, it appears, all booty captured from a hostile nation, whether on sea or land, belonged to the Crown (*f*), whose

(*a*) *Maria* v. *Hall* (1807), 1 Taunt. 33, note. As to the position and disabilities of an alien enemy, see titles ACTION, Vol. I., at p. 20 ; ALIENS, Vol. I., at p. 311 ; CONTRACT.

(*b*) 1 Bl. Com. 14th ed., 257, 258.

(*c*) As to the constitutional checks upon ministers of the Crown with relation to the conclusion of a disgraceful peace, and to the necessity for obtaining parliamentary sanction in certain cases, see p. 440, *ante;* as to the greater latitude usually allowed to the exercise of the prerogative in relation to war and peace, see p. 428, *infra.*

(*d*) It is usual on such occasions to publish notices as to the signing and ratification of the treaty of peace in the *London Gazette*, and after ratification the fact that peace is established is usually announced by proclamation. (For the ceremonies observed on the announcement of peace with Russia in 1856, see the *London Gazette*, 28th April, 1856; 2nd May, 1856. For the notices announcing the signing and ratification of the treaty, see *ibid.*, 31st March, 1856, pp. 1225—1227; 28th April, 1856, pp. 1581—1586.) The recent war in South Africa was, legally speaking, not properly a war, but rather in the nature of a rebellion, England being the suzerain power. It came legally to an end through subjugation and the annexation of the Orange Free State and the South African Republic on 24th May, 1900, and 1st September, 1900, respectively by proclamation, though such annexations were somewhat premature (see Oppenheim, Internat. Law, Vol. II., p. 278, note (1)). The ultimate terms upon which the Boer forces surrendered were drawn up in documentary form and signed at Pretoria by Lords Milner and Kitchener and all the Boer representatives on the 31st May, 1902, though this document has, it is said, no legal basis internationally (see *ibid.*). The terms of the surrender were announced to the nation by a message from the King on 2nd June, 1902 (see also Parliamentary Paper, 1902, Vol. LXIX., 1096; *Law Quarterly Review*, Vol. XXI., p. 307; and Parliamentary Debates, 4th Series, Vol. CVIII., 1086, 1103.

(*e*) As to proclamations of martial law, see p. 403, *ante.*

(*f*) Thus, if during war a subject, without the King's commission, took an enemy's ship, the prize would not belong to the captor, but to the King, or his grantee the admiral as a *droit* of the Admiralty (1 Bl. Com., 14th ed., 259, note (8)). As to *droits*, see title ADMIRALTY, Vol. I., at p. 76 ; and see, generally, title PRIZE LAW AND JURISDICTION.

rights in the case of naval booty, or prize, were frequently granted to the admiral (*g*).

Naval prize is a term now usually applied to that portion of any naval booty which is allotted to the captors by the Crown as a reward for their zeal, and, as such, is altogether a creature of the Crown both at common law (*h*) and by statute (*i*).

Naval prize.

Letters of marque and reprisal having fallen into disuse since the Declaration of Paris in 1856 (*k*), prize taken by any ship not being one of His Majesty's ships of war belongs to the Crown as a *droit* of the Admiralty (*l*), and naval prize is now principally confined to that portion of naval booty or contraband goods which is allotted by the Crown to the officers and crews of His Majesty's ships, whilst the rules for its distribution, and the jurisdiction and procedure of the various courts in relation thereto, are regulated by statute (*a*).

Officers and men of His Majesty's forces have only such rights and interests in arms, ammunition, merchandise, booty, and other prize taken in war as the Crown thinks fit to order (*b*). The distribution and sale of, and other matters relating to, such arms, booty, and prize are regulated by statute, or by rules made by the Crown under statutory authority (*c*).

Right of entry etc.

685. In time of peace, provided no breach of allegiance is committed, and subject to the provisions of the Aliens Act, 1905, relating to the exclusion and expulsion of undesirable aliens (*d*), all persons, except such as are under sentence of imprisonment or outlawry, may

(*g*) 1 Bl. Com. 14th ed., 259, note (8); *Nichol* v. *Goodall* (1804), 10 Ves. 155.

(*h*) *The Elsebe* (1804), 5 Ch. Rob. 173, 181; *Nichol* v. *Goodall*, *supra*.

(*i*) The Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 55, by which the officers and crews of His Majesty's ships are entitled only to such interest in prize as is granted by the Crown.

(*k*) Letters of marque and reprisal were formerly granted under the Great Seal in time of peace to persons aggrieved, and in cases of oppression under the statute 4 Hen. 5, stat. 2, c. 7, and entitled the holder to obtain satisfaction for injuries committed by foreigners. In time of war letters of marque, or commissions to fit out privateers, or armed ships to harass the enemy's commerce, were granted by the Lord High Admiral or the Admiralty under various statutes (see 24 Geo. 3, sess. 2, c. 47; 29 Geo. 2, c. 34; 19 Geo. 3, c. 67 (all since repealed)), or by proclamation of the King in Council (1 Bl. Com., 14th ed., 259, note (8)). During the Crimean war no letters of marque were issued, but general reprisals were granted under statute and Order in Council. See the Prize Act (Russia), 1854 (17 & 18 Vict. c. 18), and the Naval Pay and Prize Act, 1854 (17 & 18 Vict. c. 19) (both since repealed); Hertslet's Comm. Treat., Vol. X., p. 502. By the Declaration of Paris, 1856 (agreed to by Great Britain, Prussia, Austria, France, Russia, Sardinia, and Turkey), it was declared that—(1) privateering is and remains abolished; (2) the neutral flag covers hostile goods except contraband; (3) neutral merchandise, except contraband, is not seizable under the enemy's flag; (4) blockades must be effective, that is to say, maintained by a force sufficient to actually prevent access to the enemy's coast (Hertslet's Comm. Treat., Vol. X., p. 547).

(*l*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 39.

(*a*) See titles PRIZE LAW AND JURISDICTION; ROYAL FORCES; SHIPPING AND NAVIGATION.

(*b*) Army Prize Money Act, 1832 (2 Will. 4, c. 53), s. 2.

(*c*) *Ibid.* See titles PRIZE LAW AND JURISDICTION; ROYAL FORCES.

(*d*) 5 Edw. 7, c. 13; and see title ALIENS, Vol. I., p. 323.

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enter or leave the realm at any time either by land or sea (*e*), and all foreign merchants, unless publicly prohibited (*f*), may do so with impunity to themselves and their goods (*g*). So also the Crown cannot compel the subject to leave the realm for war or any other purpose (*h*), except on outlawry (*i*).

In time of war (*k*), however, where the public welfare requires it, both subjects and aliens may be restrained from entering or leaving the realm in various ways.

Thus, the common law writ of *ne exeat regno*, now generally confined in time of peace to cases of absconding debtors or persons evading justice (*l*), might, possibly, still be used as a State writ, to prevent persons leaving the realm in time of war (*m*).

The Crown may also lay embargoes upon shipping in time of war (*n*), though these are illegal in time of peace (*o*); and there is authority for the use of proclamations in time of war to restrain any persons or classes of persons from leaving the realm (*p*).

Recalling subjects.

686. It is said that the Crown enjoys the right of recalling subjects from abroad by letters under the Great Seal served by the

(*e*) Magna Carta, c. 42 (see Stubbs' Sel. Chart., 8th ed., p. 301). By the Confirmation Cartarum, 1381 (5 Ric. 2, stat. 1, c. 2, repealed 4 Jac. 1, c. 1, s. 22), all persons except the great lords were restrained from leaving the realm without the Crown's licence. Later, it seems, any person could leave the realm without licence except the clergy, earls, barons, and knights (3 Co. Inst. 179).

(*f*) Magna Carta, c. 41 (see Stubbs' Sel. Chart., 8th ed., p. 301). Prohibition would now, it seems, require an Act of Parliament in time of peace.

(*g*) Magna Carta, c. 41 (see Stubbs' Sel. Chart., 8th ed., p. 301). If war broke out, foreign merchants were to be attached until the King or the Chief Justiciary was informed how English merchants were treated in the enemy's country, and if our merchants were secure, then theirs were to be so also (*ibid.*).

(*h*) *Broadfoot's Case* (1743), Fost. 154, 157, 158.

(*i*) As to outlawry, see title CRIMINAL LAW AND PROCEDURE.

(*k*) The words "in time of peace" are expressly inserted in the provisions of Magna Carta referred to in notes (*e*)—(*g*), *supra*. See also Vin. Abr. tit. Prerog. L, a.

(*l*) *Ex parte Brunker* (1734), 3 P. Wms. 313, note; *Sands* v. *Child* (1693), 4 Mod. Rep. 176. As to the present practice in cases of debt, see *Drover* v. *Beyer* (1879), 13 Ch. D. 242, C. A.; *Colverson* v. *Bloomfield* (1885), 29 Ch. D. 341, C. A. See also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 55.

(*m*) *Ne exeat regno* was originally a State writ granted by the Chancellor on the application of a Secretary of State either with or without cause shown (see Bacon's L. T. Ordinance, No. 89; 1 Bl. Com., 14th ed., 266; 4 Mod. Rep. 177, note (b)). As to the present use, see note (*l*), *supra*.

(*n*) 1 Bl. Com., 14th ed., 263; *Merchant Adventurers* v. *Rebow* (1687), 3 Mod. Rep. 126; *Sands* v. *Child* (1693), 4 Mod. Rep. 176, 177, 179; Skin. 335. This can be done either by proclamation (see *ibid.*) or by Order in Council. At the time of the Crimean war in 1854 an embargo was laid upon all Russian ships by Order in Council, which also granted general reprisals against Russian trade, prohibited English vessels from entering and clearing for any Russian port, and granted Russian vessels six weeks' grace to clear. For the Order in Council, see Hertslet's Comm. Treat., Vol. X., p. 503; *London Gazette*, 29th March, 1854, 1009.

(*o*) See note (*i*) on p. 460, *post*, as to the last occasion on which an embargo was laid upon shipping in time of peace.

(*p*) According to Blackstone, "the established law is, that the King may prohibit any of his subjects from leaving the realm" (1 Bl. Com., 14th ed., 270). But it may be doubted how far this doctrine extends in time of peace in face of the provisions of Magna Carta stated above. As to prohibiting persons from leaving the realm by proclamation, see 3 Co. Inst. 179; Fitz. Nat Brev. 85; Vin. Abr. tit. Prerog. L, a).

King's messenger (*q*), disobedience thereto formerly rendering the person's property in the realm liable to seizure under a commission issued by the Exchequer until the recall was complied with (*r*). This prerogative, so far as it is not obsolete, applies, it seems, either in time of war or in time of peace.

Alien enemies.

687. No subject of an enemy's country may enter the realm during war, and if he does so, or if he embarks upon the high seas in a vessel of his own country whilst a state of war prevails, both his person and his goods are liable to seizure (*s*).

Blockades.

688. In time of war the Crown may promulgate blockades of ports or any portion of the coast belonging to an enemy (*a*). When promulgated, such blockades render neutral vessels attempting to enter the blockaded area liable to be treated as enemies (*b*); but, in order to be internationally binding, blockades must be effective (*c*), and the neutral must be affected with notice of the blockade either actual or constructive (*d*). The raising of a blockade is usually announced to the nation by notice or proclamation (*e*).

(*q*) 3 Co. Inst. 180; 1 Hawk. P. C. 22. The privy seal is also mentioned, but its use has now been abolished (see p. 477, *post*).

(*r*) *Ibid.*

(*s*) 1 Bl. Com., 14th ed., 259. By the Declaration of Paris, 1856, a neutral flag now protects hostile goods so long as they are not contraband of war (see Hertslet's Comm. Treat., Vol. X., p. 547). But as to passports to alien enemies, and the position of aliens generally in time of war, see title ALIENS, Vol. I., at p. 310.

(*a*) Prior to 1856, it seems, all neutral vessels trading with a belligerent were liable to seizure by the other belligerent, though this right was generally waived (see the declaration as to neutral trade issued at the commencement of the war with Russia, *London Gazette*, 28th March, 1854, 1007, and the Order in Council granting neutrals free trade with Russia except in contraband goods and to blockaded ports, *London Gazette*, 18th April, 1854, p. 1207). Since the Declaration of Paris, 1856 (see note (*k*), p. 445, *ante*), only neutral vessels attempting to run the blockade or to leave the blockaded area are subject to seizure, except in the case of neutral vessels carrying contraband of war, which in ordinary cases entails confiscation of the contraband goods, and in some cases of the ship (see Halleck, International Law, 3rd ed., Vol. II., pp. 208, 216, 217). As to contraband of war, see titles PRIZE LAW AND JURISDICTION; SHIPPING AND NAVIGATION.

(*b*) Strictly speaking, both ship and cargo are liable to confiscation and the officers and crew treated as enemies, though the practice as generally observed is more lenient both with regard to the officers and crew and to the owners of cargo, where the latter have no knowledge of the blockade (see title PRIZE LAW AND JURISDICTION).

(*c*) That is to say, the blockade must be maintained by a force sufficient really to prevent access to the enemy's coast (see the Declaration of Paris, 1856, Hertslet's Comm. Treat., Vol. X., p. 547). As to the signatories to this Declaration, see note (*k*), p. 445, *ante*.

(*d*) Actual notice is effected either by the blockading vessels to neutral ships or by general notice given to the diplomatic agents of neutral powers or otherwise published. Where the blockade is sufficiently notorious, constructive notice would be imputed by a prize court, without any actual notice (see Halleck, International Law, 3rd ed., Vol. II., pp. 196, 197).

(*e*) At the termination of the war with Russia notice of the armistice and of the raising of the blockades of Russian ports was given in the *London Gazette*, 8th April, 1856, p. 1334.

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689. The Crown also enjoys certain statutory powers (which are applicable either in time of war or peace) of prohibiting the importation of dangerous explosives, or the exportation or carriage coastwise of arms, ammunition, and other military and naval stores (*f*).

Entry on private land.

690. In time of war the Crown may enter on the land of a subject to erect fortifications (*g*), or to dig for saltpetre (*h*).

Certain compulsory powers of purchasing any lands, buildings, or other hereditaments or easements, either absolutely or for a limited period, or of stopping up or diverting public or private footpaths, or bridle roads, may also be exercised at any time by the Secretary of State for War for the service of the department or the defence of the realm (*i*).

Compulsory service.

691. The Crown may also demand, and is entitled to, the personal services of every man capable of bearing arms in case of sudden invasion or dangerous rebellion, but except on such occasions it has no power to compel enlistment (*k*).

SUB-SECT. 6.—*Foreign Jurisdiction.*

Jurisdiction over British subjects abroad.

692. In certain foreign countries (*l*), and also in British protectorates (*m*), the Crown has acquired jurisdiction (*n*) over British subjects, and in some cases over foreigners (*o*), by treaty, capitulation,

(*f*) As to the importation of dangerous explosives, see Explosives Act, 1875 (38 Vict. c. 17), s. 43, and title EXPLOSIVES. As to the exportation of arms, ammunition etc., see Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 138, 139, and title SHIPPING AND NAVIGATION.

(*g*) *Magdalen College Case* (1615), 1 Roll. Rep. 151, 152.

(*h*) See *Case of Saltpetre* (1606), 12 Co. Rep. 12.

(*i*) Defence Act, 1842 (5 & 6 Vict. c. 94), ss. 16, 19, and as to the extinguishment of common and other rights over lands purchased, see the Defence Act, 1854 (17 & 18 Vict. c. 67), s. 1. As to the transfer of duties from the former Board of Ordnance to the Secretary of State for War, see Vol. VII., Part VI., sect. 8. See also the Defence Acts, 1859, 1860, 1865, and 1873 (22 Vict. c. 12, s. 4; 23 & 24 Vict. c. 112, s. 12; 28 & 29 Vict. c. 65; 36 & 37 Vict. c. 72)—collective title of all the above Acts, "the Defence Acts, 1842 to 1873," given by the Short Titles Act, 1896 (59 & 60 Vict. c. 14). The powers of the Lands Clauses Acts may also be employed by any Secretary of State and certain other public bodies for the compulsory purchase of land for military purposes under the Military Lands Acts, 1892—1903 (55 & 56 Vict. c. 43; 63 & 64 Vict. c. 56; 3 Edw. 7, c. 47); and see title COMPULSORY PURCHASE AND COMPENSATION, *ante*.

(*k*) *Broadfoot's Case* (1743), Fost. 154, 157—159, 175.

(*l*) "Foreign country" means any country or place out of His Majesty's dominions (Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 16).

(*m*) As to British protectorates generally, and the jurisdiction exercised by the Crown therein, see title DEPENDENCIES AND COLONIES.

(*n*) "Jurisdiction" includes "power" (Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 16).

(*o*) Jurisdiction over foreigners is not generally claimed and exercised by the Crown, even in British protectorates, without the consent of the foreigner and of his Government. This principle is based on the theory that the jurisdiction so exercised is delegated by the Government of the country in which it is exercised. At the Berlin Conference of 1884-5 England did not acquiesce in the general views of the various other European countries as to the unlimited jurisdiction over subjects and foreigners which is claimed and exercised by them in

grant, usage, sufferance, and other lawful means (*a*); and where a foreign country is not subject to any Government from whom the Crown might obtain jurisdiction in any of these ways, jurisdiction has been conferred upon the Crown by statute over British subjects for the time being resident in or resorting to that country (*b*).

The jurisdiction so acquired or hereafter to be acquired in any foreign country may be held, exercised, and enjoyed by the Crown in the same and as ample a manner as if acquired by the cession or conquest of territory (*c*), and every act and thing done in pursuance thereof is to be as valid as if it had been done according to the local law then in force in such foreign country (*d*).

If any question as to the existence or extent of any jurisdiction of the Crown in any foreign country arises in any proceedings civil or criminal in a court in the dominions of the Crown, or held under the authority of the Crown, the court may apply (*e*) to a Secretary of State to decide the same. On such application the Secretary of State must within a reasonable time send to the court his decision thereon (*f*), which is final for the purposes of the proceedings (*g*).

Consular and other courts in foreign countries.

693. The jurisdiction so vested in the Crown is exercised by means of courts established in foreign countries by Order in Council under statutory powers (*h*). Such courts have in some cases permanent judges and assistant judges (*i*), or may be held by consuls-general, consuls, or vice-consuls (*k*), according to the

their protectorates. But by assenting to the general Act of the Brussels Conference of 1890 as to African protectorates England has apparently acquiesced in the extension of jurisdiction to foreigners, at least with regard to Africa (see Hall, Foreign Jurisdiction, pp. 210 *et seq.*; Hall, International Law, p. 114, n.). See further as to protectorates, title DEPENDENCIES AND COLONIES.

(*a*) These are the modes of acquisition recited in the preamble to the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37). As to the jurisdiction of the Crown in colonies, see pp. 421—427, *ante*, and title DEPENDENCIES AND COLONIES.

(*b*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 2. Note that the jurisdiction conferred is confined to British subjects. But this section would not, it seems, afford a valid argument by a foreigner in support of a plea of want of jurisdiction in a protectorate court, since foreign nations themselves claim and exercise jurisdiction over foreigners in their protectorates. See Hall, Foreign Jurisdiction, pp. 221 *et seq.*

(*c*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 1. As to jurisdiction in ceded and conquered colonies, see pp. 423—427, *ante*, and title DEPENDENCIES AND COLONIES.

(*d*) *Ibid.*, s. 3.

(*e*) The court must send questions framed so as properly to raise the question in a document under the seal of the court or signed by a judge of the court (*ibid.*, s. 4 (2)).

(*f*) Sufficient answers to the questions (note (*e*), *supra*) sent are to be returned to the court by the Secretary of State, and on production such answers are to be conclusive evidence of the matters therein contained.

(*g*) *Ibid.*, s. 4, and see notes (*e*), (*f*), *supra*.

(*h*) Conferred by the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37). As to the exercise of these powers, see pp. 451—454, *post*.

(*i*) *E.g.*, the China and Corea Orders, 1865 and 1878; Zanzibar Order, 1897; Somaliland Order, 1899 (see Stat. R. & O. Rev., Foreign Jurisdiction).

(*k*) *E.g.*, the Brunei Order, 1901; Persia Order, 1889; Morocco Order, 1889 (see Stat. R. & O. Rev.).

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provisions of the various orders in force. In most cases an appellate jurisdiction is provided for by the orders and vested either in the court of some adjacent colony or in a supreme court specially constituted for some particular foreign territory (*l*).

Except in African protectorates (*m*), the consent of a foreigner and his Government to the jurisdiction is generally rendered necessary before he can be brought before the courts (*n*), which are, however, usually empowered to exercise both civil and criminal jurisdiction over British subjects to the extent specified in the order without the consent of the latter (*o*).

In some cases the laws obtaining in other portions of the Empire are made applicable (*p*), and where jurisdiction is vested in consuls the powers, privileges, and immunities of a sheriff in England are sometimes conferred (*q*).

African protectorates.

In British protectorates in Africa the high commissioner, administrator, or governor is usually empowered to erect courts and make rules for the administration of justice within the protectorate by proclamation subject to a power of disallowance by the Crown (*r*).

Colonial courts.

694. Any jurisdiction, civil or criminal, original or appellate, which may lawfully be assigned to or conferred on any British court in any foreign country by Order in Council, may be so assigned to or conferred by the Crown on any court in any British possession, or held under the authority of the Crown, and the provisions and regulations respecting the exercise of the jurisdiction so assigned, and the enforcement and execution of the judgments, decrees, orders, and sentences of any such court and appeals therefrom as His Majesty in Council may think fit, may also be be made by Order in Council (*s*).

Admiralty jurisdiction may be conferred by Order in Council upon courts established by the Crown out of the British dominions (*t*).

(*l*) See the Orders cited in notes (*i*), (*k*), on p. 449, *ante*.

(*m*) See note (*o*), p. 448, *ante*, and title DEPENDENCIES AND COLONIES.

(*n*) *E.g.*, the China and Corea Order, 1881, art. 47 (b) (Stat. R. & O. Rev., Foreign Jurisdiction, p. 264).

(*o*) See the Orders cited in notes (*i*), (*k*), on p. 449, *ante*.

(*p*) *E.g.*, certain laws of British India and the United Kingdom in Somaliland and Zanzibar (see the Somaliland Order, 1899; Zanzibar Order, 1897).

(*q*) *E.g.*, the Brunei Order, 1901, art. 10.

(*r*) *E.g.*, the Southern Nigeria Order, 1899; and see title DEPENDENCIES AND COLONIES.

(*s*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 9. For the various Orders in Council made under this authority, see the Statutory Rules and Orders.

(*t*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 12. The provisions of this Act may be so applied to any such foreign court, subject to any conditions, exceptions, and qualifications in the order, as if such court were a colonial court of admiralty, and rules may be made by order for carrying such application into effect (*ibid.*). As to the provisions of the Act, see title DEPENDENCIES AND COLONIES. As to the jurisdiction which may be conferred upon colonial courts of admiralty and East African vice-admiralty courts, see the Slave Trade (East African Courts) Acts, 1873 and 1879 (36 & 37 Vict. c. 59; 42 & 43 Vict. c. 38); Colonial Courts of Admiralty Act, 1890, (53 & 54 Vict. c. 27), s. 13; and title DEPENDENCIES AND COLONIES.

Executing sentence.

695. Sentence of death, penal servitude, imprisonment, or any other punishment, passed upon an offender convicted before a British court in a foreign country (*a*), is to be carried into effect in such place as may be directed by Order in Council or determined in accordance with directions given by Order in Council, and the conviction and sentence is to be of the same force in that place as if the conviction had been made and sentence passed by a competent court therein (*b*).

Parliamentary control.

696. Orders in Council exercising these powers must be laid before both Houses of Parliament immediately after they are made, if Parliament is sitting, and, if not, immediately after the commencement of the then next session (*c*).

Such orders are to have effect as if enacted in the Foreign Jurisdiction Act, 1890 (*d*), and may be varied or revoked (*e*). But if repugnant in any respect to the provisions of any Act of Parliament extending to British subjects in the foreign country to which they relate, or to any order or regulation made under the authority of any such Act, or having in that country the force and effect of any such Act, the orders are to be read subject to such Act, order, or regulation, and are void to the extent of the repugnancy, but not otherwise; and unless repugnant to some such Act, order, or regulation as above, they are not to be deemed void as being repugnant to the law of England (*f*).

Deportation.

Where such Orders in Council authorize any British court in a foreign country to order the removal or deportation of any person from that country, the removal or deportation and any detention for the purposes thereof, according to the provisions of the Order, are to be as lawful as if the order of the court were to have effect wholly within that country (*g*).

India.

Orders in Council extending to persons enjoying His Majesty's protection are to be taken to include all subjects of the several States and princes in India (*h*).

Foreign jurisdiction.

697. The Crown is empowered to direct by Order in Council that certain Acts (*i*), or any amending or substituted Acts for the

(*a*) "British court in a foreign country" means any court having jurisdiction out of His Majesty's dominions in pursuance of an Order in Council made under any Act or otherwise (Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 16).

(*b*) *Ibid.*, s. 7.

(*c*) *Ibid.*, s. 11.

(*d*) *Ibid.*

(*e*) *Ibid.*, s. 10.

(*f*) *Ibid.*, s. 12.

(*g*) *Ibid.*, s. 8.

(*h*) *Ibid.*, s. 15. As to Indian States, see title DEPENDENCIES AND COLONIES.

(*i*) *Ibid.*, Sched. I. These Acts are as follows:—Admiralty Offences (Colonial) Act, 1849 (12 & 13 Vict. c. 96); Evidence Act, 1851 (14 & 15 Vict. c. 99), ss. 7, 11; Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), Part X.; Foreign Tribunals Act, 1856 (19 & 20 Vict. c. 113); Evidence by Commission Act, 1859 (22 Vict. c. 20); British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63); Admiralty Offences (Colonial) Act, 1860 (23 & 24 Vict. c. 122); Foreign Law Ascertainment Act, 1861 (24 & 25 Vict. c. 11); Merchant Shipping Act,

SECT. 8. The Crown in Foreign Relations.

time being in force, shall extend to any foreign country in which it has jurisdiction for the time being, subject to any exceptions, adaptations, or modifications mentioned in the Order. When so extended, the enactments operate, to the extent of the jurisdiction, as if the foreign country were a British possession and His Majesty in Council the legislature of the same (*k*).

Repeal of statutes.

698. Certain Acts, repealed to the extent mentioned in the Act as respects any British possession as from the commencement of the Colonial Courts of Admiralty Act, 1890, in such possession, may also be repealed to a similar extent as respects any courts out of His Majesty's dominions as from the date of any Order applying the before-mentioned Act (*l*), subject to certain provisions (*m*).

Certain Acts relating to the exercise of foreign jurisdiction are repealed (*n*), subject to a proviso that any Order in Council, commission, or instruction made or issued in pursuance of the repealed enactments shall, if in force on 4th August, 1890, continue in force as if made in pursuance of the Foreign Jurisdiction Act, 1890, until altered or revoked by His Majesty, and shall for the purposes of the last-mentioned Act be deemed to have been made or issued thereunder (*o*).

Jurisdiction in China seas.

699. Laws for the government of British subjects being in any vessel at a distance of not more than one hundred miles from the

1867 (30 & 31 Vict. c. 124), s. 11; Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 51; Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69); Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74).

(*k*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 5.

(*l*) Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 18. The Acts are 56 Geo. 3, c. 82; 2 & 3 Will. 4, c. 51; Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), s. 2; Judicial Committee Act, 1843 (6 & 7 Vict. c. 38), ss. 2, 3, 5, 7, 9, 10, 12, 15; Judicial Committee Act, 1844 (7 & 8 Vict. c. 69), s. 12; Vice-Admiralty Courts Act, 1863 (26 Vict. c. 24); Vice-Admiralty Courts Amendment Act, 1867 (30 & 31 Vict. c. 45); Slave Trade (East African Courts) Act, 1873 (36 & 37 Vict. c. 59), ss. 4, 5; Slave Trade Act, 1873 (36 & 37 Vict. c. 88), ss. 20, 23; Pacific Islanders Protection Act, 1875 (38 & 39 Vict. c. 51), s. 6. See Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), Sched. II.

(*m*) These provisions are:—(1) Any appeal against a judgment made before the commencement of the Act (namely, when applied by Order, *semble*) may be brought, and any such appeal and proceedings or appeals pending at the commencement of the Act may be completed and carried into effect, as if such repeal had not been enacted. (2) All enactments and rules in force on the 25th July, 1890, touching the practice, procedure, fees, costs, and returns, in matters relating to the slave trade in vice-admiralty courts and in East African courts (see note (*t*), p. 450, *ante*), are to have effect as rules made in pursuance of the Act, and are to apply to colonial courts of admiralty and may be altered and revoked accordingly (Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), s. 18 (a), (b)).

(*n*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 18, Sched. III. The Acts so repealed are:—Foreign Jurisdiction Acts, 1843, 1865, 1866, 1875, and 1878 (6 & 7 Vict. c. 94; 28 & 29 Vict. c. 116; 29 & 30 Vict. c. 87; 38 & 39 Vict. c. 85; 41 & 42 Vict. c. 67); the statute 20 & 21 Vict. c. 75; Slave Trade Act, 1876 (39 & 40 Vict. c. 46), ss. 4, 6; and the Siam and Straits Settlements Jurisdiction Act, 1870 (33 & 34 Vict. c. 55).

(*o*) *Ibid.*, s. 18 (1). Any enactment, Order in Council, or document referring to any of the enactments in the last note is to be construed to refer to the corresponding enactment of the Foreign Jurisdiction Act, 1890 (*ibid.*, s. 18 (2)).

coast of China or Japan may be made by the Crown by Order in Council as fully and effectually as any such law may be made for the government of British subjects in China or Japan (*p*).

Africa.

700. Certain enactments for the prevention and punishment of offences committed by British subjects in Africa (*q*) may be revoked or varied by the Crown by Order in Council (*r*).

Limitations on actions.

701. Actions, suits, prosecutions, or proceedings for certain acts, neglects, or defaults relating to the exercise of foreign jurisdiction (*s*) do not lie against any person unless brought (*t*) :—

(1) In any court within His Majesty's dominions within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof, or where the cause of action arose out of His Majesty's dominions within six months after the parties to the action, suit, prosecution, or proceeding have been within the jurisdiction of the court in which the same is instituted:

(2) In any of His Majesty's courts without His Majesty's dominions within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. In this case no action lies unless the cause of action arose within the jurisdiction of the court where the proceeding is brought (*a*).

Arrest venue.

702. Powers are conferred upon any person having authority derived from His Majesty in that behalf to issue a warrant causing a person charged with an offence cognisable by a British court in a foreign country to be sent for trial to any British possession for the time being appointed in that behalf by Order in Council (*b*),

(*p*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 14. The powers referred to as to China and Japan are (*semble*) those conferred by the Foreign Jurisdiction Act, 1890, as stated in the text, *supra*.

(*q*) Namely, Sierra Leone Offences Act, 1861 (24 & 25 Vict. c. 31); South Africa Offences Act, 1863 (26 & 27 Vict. c. 35).

(*r*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 17.

(*s*) These acts are—any act done in pursuance or execution, or intended execution, of the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), or of any enactment repealed by the Act (see note (*n*) on p. 452, *ante*), or of any Order in Council under the Act, or of any such jurisdiction of His Majesty as is mentioned therein, or in respect of any alleged neglect or default in the execution of the Act, or of any such enactment, Order in Council, or jurisdiction as aforesaid.

(*t*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 13 (1).

(*a*) *Ibid.*, s. 13 (1) (a), (b). In any such action, suit, or proceeding, tender of amends before the same was commenced may be pleaded in lieu of or in addition to any other plea. If the action, suit, or proceeding was commenced after such tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he cannot recover any costs incurred after such tender or payment, and the defendant is entitled to costs to be taxed as between solicitor and client as from the time of such tender or payment; but this provision is not to affect costs on any injunction in such action, suit, or proceeding (*ibid.*, s. 13 (2)). See also the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*b*) As to the provisions applicable to such Orders in Council, see pp. 449—452, *ante*.

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subject to certain provisions in favour of the person charged as to the taking of evidence in the foreign country where the offence is alleged to have been committed (*c*); but this provision is not to alter or repeal any law or usage by virtue of which any offence committed out of the Crown's dominions may, irrespectively of the Foreign Jurisdiction Act, 1890, be inquired of, tried, determined, and punished within the Crown's dominions (*d*).

Probate.

703. Probates or letters of administration granted by a British court in a foreign country may be sealed in the United Kingdom under the provisions of the Colonial Probates Act, 1892, provided that Act has been made applicable to such foreign country by Order in Council under the Act (*e*).

SECT. 9.—*The Crown as the Fountain of Honour.*

Titles of honour.

704. As all public offices are derived either mediately or immediately from the Crown (*f*), so the Sovereign enjoys the sole right

(*c*) Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 6. Upon arrival of the person so charged in any such British possession, the criminal court of such possession authorised in that behalf by Order in Council, or, if no court is so authorised, the supreme criminal court of such possession, may cause him to be kept in safe and proper custody, and as soon as may be convenient, inquire of, try, and determine the offence, and on conviction punish the offender according to the laws in force in such possession, in the same manner as if the offence had been committed within the jurisdiction of such criminal court.

Before being so sent for trial a person so charged may tender for examination to a British court in the foreign country where the offence is alleged to have been committed any competent witness whose evidence he deems material for his defence, and whom he alleges himself unable to produce at the trial in the British possession. In such case the British court in the foreign country must proceed in the examination and cross-examination of the witness as though he had been tendered at a trial before that court, and must cause the evidence so taken to be reduced into writing, and transmit a copy thereof to the criminal court of the British possession by which the person charged is to be tried, such copy being certified as correct under the seal or signature of a judge of the court when taken. The court before which the trial takes place must allow so much of the evidence so taken as would have been admissible according to the law and practice of that court, had the witness been produced and examined at the trial, such evidence to be read and received as legal evidence at the trial. The court of the British possession must admit and give effect to the law by which the alleged offender would have been tried by the British court in the foreign country in which the offence was alleged to have been committed, so far as that law relates to the criminality of the act, or the nature or degree of the offence, or the punishment thereof, if the law differs in those respects from the law in force in such British possession (*ibid.*, s. 6 (1)).

(*d*) *Ibid.*, s. 6 (2). As to treason and other offences committed outside British territory, see p. 353, *ante*, and note (*f*), *ibid.* As to extradition for offences committed in British territory, see title EXTRADITION AND FUGITIVE OFFENDERS. As to sentences which may be passed by colonial courts on persons tried there under Imperial Acts for crimes committed outside their jurisdiction, see the Courts (Colonial) Jurisdiction Act, 1874 (37 & 38 Vict. c. 27), ss. 2, 3, and title DEPENDENCIES AND COLONIES. As to the trial and sentence of persons sent for trial to any place under the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), see s. 23 of that Act, the Courts (Colonial) Jurisdiction Act, 1874, *supra*, and title EXTRADITION AND FUGITIVE OFFENDERS.

(*e*) Colonial Probates Act, 1892 (55 Vict. c. 6), s. 3. As to when the Act may be applied, see *ibid.*, s. 1. As to the provisions of the Act generally, see title DEPENDENCIES AND COLONIES.

(*f*) See p. 387, *ante*.

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of conferring all titles of honour, dignities, and precedence (*g*), and no subject can acquire a new title or dignity except by grant from the Crown, unless it be conferred by Act of Parliament (*h*), or acquired by marriage (in the case of a female) (*i*), or obtained by prescription, which, however, presupposes a lost grant (*k*).

Titles of honour are conferred either by express grant in the form of letters patent, or by writ of summons in the case of peerages, or by direct corporeal investiture, as in the case of knights (*l*).

Creation of new titles.

705. Subject to certain restrictions (*m*), the Sovereign can create any new title or dignity which did not exist before (*n*), and can confer any title or precedence upon such of his subjects as he pleases (*o*).

It is usual, however, where titles are conferred as a reward for parliamentary or other public services, for the Crown to be guided largely by the advice of the Prime Minister; and, though no stated rule exists as to the times at which honours are conferred, such occasions as the birthday of the Sovereign, New Year's Day, or a change of ministry, are usually marked by the bestowal of honours.

Peers.

706. The Sovereign, it seems, cannot create another sovereign in any part of his dominions (*p*); nor can he create a peerage with a right of precedence contrary to the statute (*q*) by which the precedence of all the nobility and great officers of state is regulated (*r*). But he may, it appears, grant rank and precedence before the officers of state and peers of the realm to a foreign prince intermarrying with the Royal Family (*s*); and he may create baronets with

(*g*) 4 Co. Inst. 361, 363; 1 Bl. Com., 14th ed., 271. The King is the fountain of all honour and dignity (*The Prince's Case* (1605), 8 Co. Rep. 1, 18 b. The Crown's right of granting precedence was declared by the statute 31 Hen. 8, c. 10. As to honours conferred upon British subjects by foreign states, see title DIGNITIES.

(*h*) Com. Dig. tit. Dignity, C, 5. The House of Lords by itself cannot confer a new title, though it enjoys the right of adjudicating on disputed peerage claims if the Crown refers the question to it (see *R.* v. *Knollys* (1694), 1 Ld. Raym. 10).

(*i*) Co. Litt. 16 b.

(*k*) Co. Litt. 16 a.

(*l*) 1 Bl. Com., 14th ed., 272. See also title DIGNITIES.

(*m*) See the text, *infra*.

(*n*) *Anon.* (1611), 12 Co. Rep. 81; 1 Bl. Com., 14th ed., 271.

(*o*) 4 Co. Inst. 361. By the free distribution of peerages the Crown might ensure the passing of any measure by the House of Lords, as was done by Queen Anne, in 1712, with regard to the treaty of Utrecht. In 1719 a Bill restraining the creation of peers within certain limits was introduced by Lord Sunderland and passed by the House of Lords but rejected by the Commons. No statutory restraint has since been attempted (see Pike, Const. Hist. of the House of Lords, 363).

(*p*) 4 Co. Inst. 287; and see as to grants of palatine rights, p. 485, *post*, and Vol. VII., Part VII., sect. 4.

(*q*) 31 Hen. 8, c. 10. As to the provisions of this statute, see title DIGNITIES.

(*r*) *R.* v. *Knollys* (1694), 1 Ld. Raym. 10. The same principle would, it seems, apply to grants of precedence simply.

(*s*) This was done by the Prince Regent (subsequently George IV.) on the marriage of the Princess Charlotte of Wales with Prince Leopold (see the

SECT. 9. The Crown as the Fountain of Honour.

precedence before knights baronets (or bannerets), knights of the Bath, and knights bachelors (*t*).

The Crown is also limited by statute with regard to the creation of new Irish peers (*a*), whilst the right to create new Scottish peers appears to be doubtful (*b*).

Whether the Crown can limit the descent of a peerage in a manner unknown to the common law is doubtful (*c*).

Life peerages, except in the case of spiritual peers and the four Lords of Appeal in Ordinary (*d*), cannot be created by the Crown so as to confer a right to sit and vote in the House of Lords (*e*).

Peerage claims.

707. Uncertain or disputed peerage claims are adjudicated upon by the Committee for Privileges of the House of Lords, which, however, has no jurisdiction except upon a reference by the Crown (*f*); the proper procedure, therefore, in such cases is to petition the Crown (*g*).

Honours cannot be refused.

708. The subject cannot, it seems, legally refuse to accept a

London Gazette, 14th May, 1816). See also, as to the husband of the Queen Regnant, p. 367, *ante*.

(*t*) *Anon.* (1611), 12 Co. Rep. 81.

(*a*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 4, by which the Crown may create peerages of Ireland, and make promotions in such peerage, provided that only one peer is to be created for every three Irish peerages which existed at the time of the Union becoming extinct. When by extinction or otherwise the number of Irish peers (exclusive of those holding any peerage of Great Britain subsisting at the time of the Union, or of the United Kingdom created since the Union, by which they are entitled to an hereditary seat in the House of Lords) falls below one hundred, either by extinction, or by any Irish peer becoming entitled to an hereditary seat in the House of Lords, one new Irish peer may be created for every such vacancy occurring below that number, so that the number of Irish peers not entitled to an hereditary seat in the House of Lords may be kept up to one hundred. Peerages in abeyance are to be taken as existing peerages, and extinction is not to be deemed to take place until after default of claimants for one year after the death of the person last entitled, such claim to be made in the manner prescribed by the House of Lords. This provision is not to exclude subsequent claims to peerages deemed extinct, and in such case where a claim is subsequently allowed, and a creation to fill the vacancy had occurred in the interval, no new right of creation is to accrue on the next extinction of a peerage. As to Irish representative peers, see title PARLIAMENT.

(*b*) Since there is no provision authorising fresh creations in the Union with Scotland Act, 1706 (6 Ann. c. 11; 5 & 6 Ann. c. 8, Ruff.). As this Act does not expressly bar the creation of Scottish peerages, but only limits the number of representative peers (*ibid.*, art. 22), it seems doubtful whether the Crown is restrained (see *Queensberry's (Duke) Case* (1719), 1 P. Wms. 582, 585, H. L.). As to the election of Scottish representative peers, see title PARLIAMENT.

(*c*) *The Devon Peerage* (1831), 2 Dow & Cl. 200, H. L., earldom granted to a man and his *heirs male* held good; *Wiltes Peerage Claim* (1869), L. R. 4 H. L. 126, a similar grant held bad. The fact that a writ of summons confers a title upon the heirs lineal and not upon the heirs general is an argument in favour of the Crown's right. See also p. 487, *post*, and title DIGNITIES.

(*d*) As to these, see title PARLIAMENT.

(*e*) *The Wensleydale Peerage* (1856), 5 H. L. Cas. 958.

(*f*) See *De la Warre's (Lord) Case* (1597), 11 Co. Rep. 1; *Waterford's (Earl) Claim* (1832), 6 Cl. & Fin. 133, H. L.

(*g*) *R.* v. *Knollys* (1694), 1 Ld. Raym 10, 17. For the practice and procedure in peerage cases, see titles COURTS; DIGNITIES; PARLIAMENT.

dignity or honour conferred by the Crown (*h*), and it is said that a peer may be fined by the Crown for not taking his seat in the House of Lords in compliance with a writ of summons (*i*).

Perpetuity of titles.

709. A title, when conferred, cannot be extinguished except by the extinction of inheritable blood by death or attainder (*k*) or by Act of Parliament (*l*), for which poverty has been considered a good ground (*m*).

Thus, a title cannot be surrendered (*n*), nor aliened, even with the King's consent (*o*); nor can the holder be degraded by the King without an Act of Parliament (*p*).

Moreover, a previous title does not merge in a new grant: Thus, a barony by writ does not merge in a new grant by letters patent (*q*), and a lesser title does not merge in a greater one subsequently united in the same person by grant or otherwise (*r*), for even if the greater title becomes extinct through failure of inheritable blood under the particular limitations of the grant, the lesser may continue as originally limited and is not necessarily extinguished with the greater (*s*).

Abeyance.

So also, where a title or dignity descends to coheirs, as to coparceners, it is not extinguished, but falls into abeyance and becomes vested in the King (*t*), who can terminate the abeyance by nomination of one of the coheirs (*a*). In the case of a commoner

(*h*) 4 Co. Inst. 43, 44; see also *Queensberry's (Duke) Case* (1719), 1 P. Wms. 582, 592. See also as to the refusal of offices, note (*f*), p. 387, *ante*.

(*i*) See the references in the last note, and title PARLIAMENT.

(*k*) See *Nevil's Case* (1604), 7 Co. Rep. 33 a; 1 Bl. Com., 14th ed., 402. Attainder having been abolished in all cases of treason and felony by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 1, can now, it seems, only be effected by Act of Parliament.

(*l*) See 4 Co. Inst. 355; *Shrewsbury's (Earl) Case* (1612), 12 Co. Rep. 107; 1 Bl. Com., 4th ed., 370.

(*m*) In the reign of Edward IV. George Nevill, Duke of Bedford, was degraded by Act of Parliament on account of poverty (4 Co. Inst. 355; 1 Bl. Com., 14th ed., 402). See also *Shrewsbury's (Earl) Case, supra*, at p. 108; *Purbeck Case* (1678), Collins, Baronies by Writ (ed. 1734), 293, 306. In such a case the title would, it seems, be extinguished.

(*n*) No honour may be drowned or extinguished by surrender, grant, fine, or any other conveyance to the King. See resolution of the House of Lords, Lords' Journal, 1st February, 1640. This principle must be applied at the present day to a peerage ostensibly surrendered in 1302 (*Norfolk (Earldom) Peerage Claim*, [1907] A. C. 10).

(*o*) See *the Purbeck Case* (1678), Collins, Baronies by Writ (ed. 1734), p. 293; see also Lords' Journal, 1st February, 1640, where it was resolved by the House of Lords that a peer cannot aliene or transfer the honour to any other person. See also Cruise, Dignities, c. 2, ss. 22—29.

(*p*) *Shrewsbury's (Earl) Case, supra*, at p. 106; *R.* v. *Knowles* (1694), 12 Mod. Rep. 55. There is an old authority to the effect that a peer may be degraded by the King if he wastes his estate, but this is no longer recognised as the law (see 1 Bl. Com., 14th ed., 402).

(*q*) *De la Warre's (Lord) Case* (1597), 11 Co. Rep. 1,; *Willoughby de Broke's (Lord) Case* (1696), Collins, Baronies by Writ (ed. 1734), 321, 325.

(*r*) See *Fitzwalter's Case* (1670), Collins, Baronies by Writ (ed. 1734), 286; Cruise, Dignities, c. 4, s. 117.

(*s*) See the references in note (*r*), *supra*.

(*t*) See Lords' Journal, 8th March, 1625 (Vol. III., 535); Cruise, Dignities, c. 5, s. 30.

(*a*) Lords' Journal, 18th April, 1763, 10th April, 1764, 13th April, 1764 (Vol. XXX., 403, 561 572; Cruise, Dignities, c. 5, s. 31; 12 Co. Rep. 112.

SECT. 9. The Crown as the Fountain of Honour.

this is effected by writ of summons, where a peerage is in question, or by letters patent in the case of a female; in the case of a person holding a higher dignity, the lesser is, it seems, confirmed to him by the King's declaration under the Great Seal (*b*). But the King cannot extinguish the title when in abeyance or dispose of it to a stranger (*c*), and when only one of the coheirs remains such heir is entitled to the dignity (*d*).

SECT. 10.—*Ports and Harbours.*

SUB-SECT. 1.—*Creation of Ports and Harbours.*

Ports and harbours.

710. At common law the Crown, by virtue of the prerogative, enjoys the exclusive right of erecting ports and harbours and of assigning their limits (*e*), and this right may be exercised even where the soil is vested in a subject (*f*), though not so as to prejudice any right of property in the soil of the shore, or so as to interfere with other vested interests (*g*).

It is said that the right to create ports is not within the *jura regalia* of a county palatine, though the lord of the county palatine may be the owner of the franchise of ports and havens within the county palatine by grant or prescription (*h*).

Creation.

At common law ports and havens may be, it seems, created by proclamation where the ownership remains with the Crown (*i*), or may be granted to a subject by charter as a liberty or franchise (*k*), or claimed by prescription with the right to take tolls and dues (*l*). In the last case the claim to a harbour toll or due need not be immemorial, since harbours may be created by grant within legal memory (*m*).

But unless created by the authority of the Crown, however advantageous a particular place may be as an anchorage, it is not a legal port at common law, and there would, it seems, be no consideration

(*b*) Cruise, Dignities, c. 5, s. 43.

(*c*) Cruise, Dignities, c. 5, s. 37.

(*d*) *Ibid.*, s. 56; *Willoughby de Broke's (Lord) Case* (1695), Lords' Journal, 9th January, 1695, 17th January, 1695 (Vol. XV., 634, 643). For the law relating to peerages, titles, and dignities generally, see title DIGNITIES.

(*e*) Hale, de Portibus Maris, cap. 3, Hargrave, Law Tracts, 51. As to the right of the Crown to create a port in modern times with the right to take port duties, see *Jenkins* v. *Harvey* (1835), 1 Gale, 23, *per* PARKE, B., at p. 27.

(*f*) Hale, de Portibus Maris, c. 6, Hargrave, Law Tracts, 73; *Exeter Corporation* v. *Warren* (1844), 5 Q. B. 773.

(*g*) *Ibid.* Though at common law a port may be created either by charter or proclamation, where the bank or shore belongs to a third party, the right to unload upon the bank or shore does not pass under the charter. The usual course appears to have been for the grantee, or other owner, of the franchise or liberty of the port to secure the interest in the shore from the legal owners, as was done in the case of Hull (Hargrave, Law Tracts, 73, 74).

(*h*) *Ibid.*, 53.

(*i*) *Ibid.*, 58.

(*k*) *Ibid.*, 55, 56. The creation of ports by the Crown by way of franchise is recited in the statute 1 Eliz. c. 11, repealed 6 Geo. 4, c. 105.

(*l*) Hargrave, Law Tracts, 58, and see *Foreman* v. *Whitstable* (*Free Fishers and Dredgers*) (1869), L. R. 4 H. L. 266; *Jenkins* v. *Harvey* (1835), 1 Gale, 23; *Exeter Corporation* v. *Warren* (1844), 5 Q. B. 773.

(*m*) *Jenkins* v. *Harvey* (1835), 1 Gale, 23, *per* PARKE, B., at p. 27.

for claiming anchorage or other dues (*n*), unless under the authority of an Act of Parliament.

Prescription.

711. Both the property in the soil and the liberty or franchise of the port may become vested in the Crown by prescription, and in such manner most of the ports of the kingdom appear to have become vested, the Crown being the *primâ facie* owner of every public port (*o*).

Ancient ports.

712. At common law the Crown may not, in general, obstruct the trade of an ancient port vested in a subject, either by the creation of a new port within the limits or precincts of the former or by restricting the arrival of ships there by conditions in future charters, for that would be in derogation of its former grant (*p*). But the Crown may erect a new port in the vicinity of an old one, although the trade of the latter may be prejudiced thereby (*q*); and the Crown may, it is said, dissolve a port vested in itself originally by proclamation, or erect another in its place; and where an ancient port is vested in the Crown by prescription, a grant or charter of a new port may, it seems, contain restrictions on the trade of the former so as to bind the Crown, but not so as to bind the inhabitants of the former who have acquired prescriptive rights, the rule in such cases being that the Crown may derogate from its own rights but not from those of others (*r*).

Right of control.

713. The Crown also enjoys at common law the general superintendence and control of all ports, harbours, docks, and havens (*s*), but this right, together with the power of appointing ports and sub-ports, declaring their limits, and assigning quays for the landing of merchandise and the collection of customs, has been handed over by statute to various public bodies (*a*).

(*n*) *Foreman* v. *Whitstable* (*Free Fishers and Dredgers*) (1869), L. R. 4 H. L. 266.
(*o*) Hargrave, Law Tracts, 54, 72.
(*p*) *Ibid.*, 60, 61.
(*q*) *Ibid.*
(*r*) *Ibid.* But as to the right of closing ports, see what is said in the text and in note (*a*), *infra*.
(*s*) Hale, de Portibus Maris, Hargrave, Law Tracts, 72, 87, 97.
(*a*) As to the powers of the Treasury by warrant to appoint ports, sub-ports, havens or creeks in the United Kingdom or the Channel Islands and declare their limits, and to appoint proper places within the same to be legal quays for the lading and unlading of goods and declaring the bounds and extent of any such quays, and to appoint the ports and inland bonding places in the United Kingdom which are to be warehousing ports or places for the purposes of the Customs Acts in addition to those already appointed, see the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 11, 12. As to the powers of the Customs Commissioners, subject to the direction of the Treasury, by order to approve and appoint warehouses or places of security in such ports or places, regulate the warehousing of goods, and by orders under their hands to appoint stations for the boarding or landing of customs officers, or places to be sufferance wharves for the lading and unlading of goods, see *ibid.*, ss. 12, 13. As to the powers of the Board of Trade with regard to the erection of piers, quays, wharves, jetties etc., see the Public Harbours Act, 1806 (46 Geo. 3, c. 153), amended by the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69); the General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), amended by the General Pier and Harbour Act, 1861, Amendment

Ports and Harbours.

714. When once erected a port ought to be free and open to all to go and come (*b*), subject to the payment of proper tolls and dues (*c*), and the Crown could not, at common law, resume a port granted by charter or restrict its limits as originally created (*d*).

Freedom of ports and harbours.

The power of ascertaining the limits of all ports and of assigning wharfs and quays for the exclusive landing and loading of merchandise was, however, expressly conferred upon the Crown by statute (*e*), and the power, exercisable by warrant, of annulling the limit of any port, sub-port, haven, creek, or legal quay, appointed before or after the 24th July, 1876, and declaring the same to be no longer a port, sub-port, haven, creek, or legal quay, or of altering or varying the names, bounds, and limits of the same, subject to the preservation of certain existing interests, is now vested in the Treasury (*f*).

The right of public user extends to ports vested in a subject by grant or prescription on payment of compensation (*g*), and the tolls and dues settled by grant or prescription must be moderate and reasonable (*h*).

Closing the ports.

715. In time of peace the Crown may not, in general, restrain the free importation and exportation of goods by closing the ports or laying an embargo on shipping (*i*); nor can the Crown in time of peace limit the importation and exportation of particular goods or goods generally to particular ports (*k*). In time of war exportation or importation may be restrained by the laying on of a general embargo where it is warranted by necessity (*l*), or by the

Act, 1862 (25 & 26 Vict. c. 19), and the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69). As to the powers of the Board of Trade to regulate the removal of ballast, see the Harbours Act, 1814 (54 Geo. 3, c. 159), amended by the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69). As to the powers of the Admiralty to regulate the mooring of vessels in all ports and havens, see the Harbours Act, 1814 (54 Geo. 3, c. 159). As to the regulation of ports and harbours generally, see title SHIPPING AND NAVIGATION.

(*b*) Hale, de Portibus Maris, c. 7, Hargrave, Law Tracts, 84. But compare *Bates' Case* (1606), 2 State Tr. 371, where it is said that "the seaports are the King's gates, which he may open or shut to whom he pleases, and he has therein absolute power."

(*c*) See the references in note (*l*) on p. 458, *ante*.

(*d*) 1 Bl. Com., 14th ed., 264.

(*e*) See 1 Eliz. c. 11, repealed by 6 Geo. 4, c. 105; 14 Car. 2, (13 & 14 Car. 2, Ruff.), c. 11, s. 14, repealed by 6 Geo. 4, c. 105.

(*f*) See note (*a*), p. 459, *ante*, and title SHIPPING AND NAVIGATION.

(*g*) *Bolt* v. *Stennett* (1800), 8 Term Rep. 606, 608; Hale, de Portibus Maris, c. 7; Hargrave, Law Tracts, 77.

(*h*) *Bolt* v. *Stennett*, *supra*.

(*i*) Hale, de Portibus Maris, c. 9, Hargrave, Law Tracts, 97. A proclamation laying an embargo upon all vessels laden with wheat was issued in 1766 in order to prevent famine, Parliament not being then sitting. This being clearly illegal (and contrary in particular to the statute 22 Car. 2, c. 13), it was found necessary to indemnify the advisers of the Crown and persons acting under the proclamation by the statute 7 Geo. 3, c. 7.

(*k*) Hale, de Portibus Maris, c. 10, Hargrave, Law Tracts, 99, 100. But see note (*a*) on p. 460, *supra*.

(*l*) 1 Bl. Com., 14th ed., 270; 10 Parl. Deb. (1808), 961.

promulgation of blockades, and the necessity arising from public danger or a state of war might, it is apprehended, justify the closing of the ports.

SECT. 11.—*The Coinage.*

SUB-SECT. 1.—*Legal Money Tokens.*

Legal money.

716. The tokens known as "money," which constitute a legal medium of exchange, consist in England either of coins (*m*) made and issued by the Crown under the exclusive powers it enjoys at common law, which are now for the most part regulated by statute (*n*), or of bank notes made and issued by the Bank of England under statutory powers, which constitute legal tender for all sums above five pounds, to the amount expressed in the note or notes tendered, except when offered by the Bank of England or any branch bank thereof (*o*).

SUB-SECT 2.—*Legal Tender in Coins.*

Payment in coin.

717. Every contract, sale, payment, bill, note, instrument, or security for money, and every transaction, dealing, matter and thing relating thereto or involving the payment of or the liability to pay the same, must be made, executed, entered into, done, and had, according to the coins which are current and legal tender in pursuance of the Coinage Acts, 1870 and 1891, and not otherwise,

(*m*) It is said by Lord Coke that at common law the money of England must consist of gold or silver (see 2 Co. Inst. 577); but this is no longer the law. Copper farthings and half-pence were first issued by Charles II. in 1672 and made legal tender by proclamation up to sixpence (see 1 Bl. Com., 14th ed., 277). Bronze coins are now authorised by proclamation and statute as presently mentioned (see p. 463, *post*).

(*n*) At common law the Crown enjoys the exclusive right of making and issuing money, though formerly this right was frequently granted out as a franchise and could be claimed by prescription (1 Bl. Com., 14th ed., 277). But in all cases the impression or stamping of coins was the King's prerogative, and the grantees of the franchise had usually the stamp sent to them by the Exchequer. The denomination or value at which the coin was to pass current was also determined by the King in all cases, though he could not, it seems, debase or enhance the value below or above the sterling value (*ibid.* 277, 278; 2 Co. Inst. 577; but as to enhancing or debasing the coinage, see *contra* 1 Hale, P. C. 194). These prerogative rights still exist, but have for the most part been placed upon a statutory basis, as will appear from what is said hereafter. Where no such provision has been made by the Coinage Acts, 1870 and 1891 (33 Vict. c. 10; 54 & 55 Vict. c. 72), His Majesty, with the advice of the Privy Council, is empowered by proclamation to regulate any matters relating to the coinage and the Mint within the present prerogative of the Crown, and to revoke or alter any proclamation previously made (Coinage Act, 1870 (33 Vict. c. 10), s. 11 (10), (11)). Every such proclamation comes into force on the date therein mentioned, and takes effect as if enacted by the Coinage Act, 1870 (33 Vict. c. 10) (*ibid.*).

(*o*) But only so long as the Bank of England continues to pay its notes on demand in legal coin (Bank of England Act, 1833 (3 & 4 Will. 4, c. 98), s. 6). The section is rather ambiguous in its wording, and it has frequently been read by writers of text-books as making Bank of England notes legal tender for sums over £5 only. But it is submitted that the true construction is that given in the text, and that a £5 note is legal tender for a sum of £5. Such notes are not legal tender in Scotland or in Ireland; see Bank Notes (Scotland) Act, 1845 (8 & 9 Vict. c. 38), s. 15; Bankers (Ireland) Act, 1845 (8 & 9 Vict. c. 37), s. 6. As to bank notes generally, see title BANKERS AND BANKING Vol. I., pp. 570 574; and as to tender, see also title CONTRACT.

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unless the same be made or executed according to the currency of some British possession or some foreign State (*p*).

Legal tender.

718. To be legally valid a tender of payment of money, unless made in authorised paper currency (*q*), must be made either—(1) in coins which have been issued by the Mint in accordance with the provisions of the Coinage Acts, 1870 and 1891, and which have not been called in by any proclamation made in pursuance of the Coinage Act, 1870 (*r*), and have not become diminished by wear or otherwise so as to be of less weight than the last current weight provided by the Coinage Act, 1870, or by proclamation under the Act (*s*); (2) in coins which have been directed to be current and legal tender by proclamation issued by the Crown under the powers conferred upon it by statute, or which it enjoys at common law (*t*).

If tendered for the specific amount, or for more than the precise amount without a demand for change, or if the creditor can select his portion without giving change (*u*), such coins are a

(*p*) Coinage Acts, 1870 and 1891 (33 Vict. c. 10, s. 6; 54 & 55 Vict. c. 72). By the Union with Scotland Act, 1706 (6 Ann. c. 11; 5 & 6 Ann. c. 8, Ruff.), art. 16, the coin is to be of the same standard and value throughout the United Kingdom.

(*q*) As to legal tender in paper currency see the text above and title BANKERS AND BANKING, Vol. I., at p. 570. Nothing in the Coinage Act, 1870 (33 Vict. c. 10), is to prevent any paper currency, which under any Act or otherwise is a legal tender, from being a legal tender (Coinage Act, 1870 (33 Vict. c. 10), s. 4).

(*r*) As to the calling in of light coins etc., see p. 472, *post*.

(*s*) Coinage Act, 1870 (33 Vict. c. 10), s. 4. As to the least current weight authorised by the Act, see p. 467, *post*.

(*t*) Under the Coinage Act, 1870 (33 Vict. c. 10), s. 11 (6), (7), the Crown is empowered with the advice of the Privy Council to direct—(1) that any coins other than gold, silver, or bronze shall be current and be a legal tender for the payment of any amount, not exceeding the amount specified by proclamation and not exceeding five shillings; (2) that coins coined in any foreign country shall be current, and be a legal tender, at such rates, up to such amounts, and in such portion of His Majesty's dominions as may be so specified, due regard being had in fixing such rates to the weight and fineness of such coins as compared with the current coins of the realm. The power of legitimating foreign coin is also enjoyed by the Crown at common law (see 1 Hale, P. C. 197; 1 Bl. Com., 14th ed., 277, 278). This power is now restricted by certain statutory prohibitions as to the importation of coins (see p. 473, *post*). The powers of the Crown as to legitimating coin do not appear to have been exercised as to the United Kingdom with regard to coins other than those mentioned in the Coinage Act, 1870 (33 Vict. c. 10); but in various British possessions the native currency is frequently retained and made current by Order in Council brought into force by proclamation. For an example of such an order see the Nigeria Coinage Order, 1906 (Stat. R. & O., 1906, p. 41). Coins of other material and denominations than those mentioned in the Coinage Act, 1870 (33 Vict. c. 10), are frequently made current in British possessions and directed to be coined by the Mint by Order in Council. For examples of such orders see the Nigeria Coinage Order, 1906, *supra*; the Straits Settlements Coinage Order, 1906 (Stat. R. & O., 1906, p. 46); the East Africa and Uganda (Currency) Order in Council, 1905 (Stat. R. & O., 1905, p. 38).

(*u*) This would appear to be the combined effect of *Wade's Case* (1601), 5 Co. Rep. 114 a, 115 a (where it is said that *omne majus continet in se minus*, and that therefore a tender of a larger sum includes the smaller, but where it appears change need not necessarily have been given); *Belterbee* v. *Davis* (1811), 3 Camp. 70 (tender of bank note for £5 for a debt of £3 10*s*. with a demand for change held bad); *Brady* v. *Jones* (1823), 2 Dow. & Ry. (K. B.) 305 (tender of £7 in

legal tender—(1) in the case of gold coins for a payment of any amount; (2) in the case of silver coins for a payment of an amount not exceeding forty shillings, but for no greater amount; (3) in the case of bronze coins for a payment of an amount not exceeding one shilling, but for no greater amount (*v*).

Production of money necessary for valid tender.

There must be actual production of the money to constitute a legal tender, unless dispensed with by express declaration or equivalent act of the creditor (*w*), but it is not necessary to produce the money, it seems, where more than the just amount is demanded (*x*). A tender of money in bags without showing or counting the amount has been held good (*y*); and, where the money is accepted, the party cannot afterwards object to any part, at least so as to enable him to take advantage of a term of the bargain conditioned on non-payment (*a*), though it is otherwise, it seems, if part of the money be bad (*b*).

SUB-SECT. 3.—*The Royal Mint.*

Exclusive right to coin money.

719. Except where the powers conferred upon the Crown of proclaiming other coins to be current and legal tender are exercised (*c*), no pieces of metal, or mixed metal (*d*), of any value whatever, may be made or issued except by the Mint as a coin or a token for money, or as purporting that the holder is entitled to demand any value denoted thereon (*e*). Persons acting in contravention of this provision are liable on summary conviction to a penalty not exceeding twenty pounds (*f*).

sovereigns for an amount of £6 17*s.* 6*d.* with a demand for change held bad); *Robinson* v. *Cook* (1815), 6 Taunt. 336 (where the court inclined to the opinion that tender of a larger amount with a demand for change was bad). The tender of the larger sum is, however, good if the creditor does not object on the ground that it was more than the amount intended, or that he has no change, but upon some other ground, as that the sum claimed is more than the amount tendered (*Cadman* v. *Lubbock* (1824), 5 Dow. & Ry. (K. B.) 289; *Black* v. *Smith* (1792), Peake, 121).

(*v*) Coinage Act, 1870 (33 Vict. c. 10), s. 4.

(*w*) *Thomas* v. *Evans* (1808), 10 East, 101; *Read* v. *Goldring* (1813), 2 M. & S. 86 (production of pocket-book by an agent and offer to pay on going into a publichouse held a valid tender); *Scott* v. *Franklin* (1812), 15 East, 428 (offer by banker to pay the exact balance due, if any, held bad); and see *Kraus* v. *Arnold* (1822), 7 Moore (C. P.), 59; *Evans* v. *Judkins* (1815), 4 Camp. 156.

(*x*) *Black* v. *Smith* (1792), Peake, 121.

(*y*) *Wade's Case* (1601), 4 Co. Rep. 114 a, 115 a.

(*a*) *Ibid.*

(*b*) *Ibid.*, and see note (*u*), *supra*. As to tender, generally, see also title CONTRACT.

(*c*) These powers are set out in note (*t*), *ante*.

(*d*) The words of the Act are: "No piece of gold, silver, copper, or bronze, or of any metal, or mixed metal."

(*e*) Coinage Act, 1870 (33 & 34 Vict. c. 10), s. 5.

(*f*) *Ibid.* Summary proceedings under the Act may be taken, and penalties under the Act recovered, in England before two justices of the peace, in the manner directed by the Summary Jurisdiction (England) Acts (*ibid.*, s. 18). As to these Acts, see title CRIMINAL LAW AND PROCEDURE. The Coinage Act, 1870 (33 Vict. c. 10), also contains provisions relating to summary proceedings in Scotland, Ireland, and British possessions (see *ibid.*).

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In accordance with this provision, the whole of the legal current coinage within the British dominions, except such native or other currency as has been proclaimed legal tender in various portions of the British Empire (*g*), is made and issued by the Royal Mint in London (*h*), or by the various branches thereof authorised and established by the Crown (*i*).

Master of the Mint.

720. The Chancellor of the Exchequer for the time being by virtue of his office is the master, worker, and warden of the Royal Mint in England and governor of the mint in Scotland, but he is not thereby rendered incapable of being elected to, or of sitting or voting in, the House of Commons (*k*), and no special salary or emoluments are attached to the post.

The duties, powers, and authorities imposed on, or vested in, or to be transacted before the master of the mint may be (and in fact invariably are) performed by, or transacted before a deputy master appointed from time to time by the Treasury, whose duties are assigned and salary awarded by that body (*l*).

Powers of the Treasury.

The number, duties, and salaries of the various other officers and persons employed in the Mint in the United Kingdom or elsewhere who are permanent civil servants, are such as may be fixed from time to time by the Treasury (*m*), which is also empowered to make regulations and give directions (subject to the provisions of the Coinage Acts and any proclamation made thereunder) respecting

(*g*) As to the powers of the Crown to proclaim foreign coins legal tender, see p. 462, *ante*.

(*h*) The Royal Mint was originally established in the Tower of London, but removed thence to the present Mint on Tower Hill in the year 1810.

(*i*) By s. 11 (8) of the Coinage Act, 1870 (33 Vict. c. 10), the Crown, with the advice of the Privy Council, is empowered by proclamation to direct the establishment of any branch of the Mint in any British possession, impose, and determine the application of, charges for the coinage of gold thereat, and determine the extent to which such branch is to be deemed part of the Mint, and to which coins issued therefrom are to be current and legal tender and to be deemed to be issued from the Mint. Branch mints are at present established in Canada, at Ottawa, and in Australia, at Sydney, Melbourne, and Perth, under the control of deputy masters and superintendents. As to these and the extent to which coinage Acts are applicable, see, as to Ottawa, Order in Council and Proclamation, 2nd November, 1907 (Stat. R. & O., 1907, p. 38); as to Perth, Order in Council, 8th February, 1896, as amended by Order in Council, 7th March, 1898 (Stat. R. & O. Rev., Vol. II., Coin, p. 32); as to Melbourne, Proclamation approved by the Privy Council, 17th September, 1900 (Stat. R. & O. Rev., Vol., II. p. 38); as to Sydney, Proclamation, 17th September, 1900 (Stat. R. & O. Rev., Vol. II., Coin, p. 41). There are also mints established at Calcutta and Bombay in India (see the Annual Report of the Deputy Master and Comptroller of the Mint, 1907, Parl. Pap., Cd. 4188, 1908). The Coinage Acts do not apply to any British possession unless extended thereto, either in whole or in part, and with or without modification, by proclamation (Coinage Act, 1870 (33 Vict. c. 10), ss. 11 (9), 19).

(*k*) *Ibid.*, s. 14.

(*l*) *Ibid.*, ss. 14, 15.

(*m*) *Ibid.*, ss. 13 (1), 15. The officers at present so appointed, in addition to the deputy master and engraver of His Majesty's seals, are the chief, senior, and staff clerks, a superintendent, and an assistant superintendent of the operative department, together with a chemist and assayer and assistant assayers.

the general management of the Mint, and to revoke and alter such regulations and directions (*n*).

Right to have bullion coined.

721. Gold bullion brought to the Mint by any person must (except as mentioned hereafter) be assayed, coined, and delivered out to such person without any charge therefor or for waste in coinage. No undue preference is to be shown, and persons are to have priority according to the time at which the bullion is brought to the Mint (*o*). The Mint may, however, refuse to receive, assay, or coin the bullion, if the whole of it is such that it cannot be brought to the standard of fineness required by the Coinage Acts of 1870 and 1891 without refining some portion of it (*p*). Where the bullion is finer than the standard fineness required by the Acts, such additional amount of coin as is proportionate to the superior fineness is to be delivered to the person bringing the bullion (*q*).

Such sums as may be necessary for the purchase of bullion, in order to provide supplies of coin for the public service, may be issued by the Treasury from time to time to the master of the Mint out of the growing produce of the Consolidated Fund (*r*).

The sums received in payment for coin produced from bullion purchased, and all fees and payments received by the master or any deputy master or officer of the Mint as such, are (except where otherwise provided by proclamation in the case of any branch mint in a British possession) to be paid into the receipt of the Exchequer and carried to the Consolidated Fund (*s*).

SUB-SECT. 4.—*Dimensions, Designs, Denominations and Standards of Coins.*

Prerogative rights as to coins.

722. At common law the Crown enjoys the exclusive right of fixing the dimensions, designs, denominations and standards of weight and fineness of the various current coins (*t*). The exercise of

(*n*) Coinage Act, 1870 (33 Vict. c. 10), s. 13 (2).

(*o*) *Ibid.*, s. 8. Bullion is in fact seldom or never taken to the Mint by private firms or persons, but is sold to the Bank of England, which is bound to purchase it at the rate of £3 17*s.* 9*d.* per ounce of standard gold in exchange for bank notes, the Bank being entitled to require the bullion to be melted and assayed at the expense of the person tendering it (Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 4; and see title BANKERS AND BANKING, Vol. I., p. 571).

(*p*) Coinage Act, 1870 (33 Vict. c. 10). As to the standard of fineness, see p. 467, *post*.

(*q*) *Ibid.*

(*r*) *Ibid.*, s. 9.

(*s*) *Ibid.*, s. 10. As to the Exchequer account at the Bank of England and the Consolidated Fund, see title REVENUE.

(*t*) 1 Bl. Com., 14th ed., 277, 278. Where in early days the making of coins was granted out by the King in the form of franchises to monasteries and others, the King always retained the right of regulating the stamp or impression and denomination, and the grantees of such franchises had usually the Exchequer stamp sent to them (*ibid.*, 277). The standard is determined by the weight and fineness, and when of the true standard is termed "sterling" or "esterling," (deriv. uncertain, but probably from *esterlingi*, easterlingi, or early Saxon

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these prerogative rights with regard to the dimensions, designs, and denominations of coins is now made subject to the advice of the Privy Council (*u*), whilst the standards of weight and fineness are fixed by statute (*x*), but powers of varying the same within certain limits are allowed to the Crown, subject to similar advice (*y*).

Designs for coins.

The designs for the present coinage legally current in the United Kingdom are fixed by proclamation (*z*), whilst the materials (namely, gold, silver, or bronze) (*a*) and the denominations are those mentioned in the Coinage Act, 1870 (*b*), certain of the silver coins so mentioned being issued in each year only for purposes of the King's Maundy money (*c*), whilst certain of the gold coins are seldom issued (*d*).

Weight and fineness.

723. All coins made at the Mint of the denominations mentioned in the Coinage Act, 1870, are to be of the weight and fineness specified thereby; and if since the 4th April, 1870, any other coin

traders; see 1 Bl. Com., 14th ed., 277, 278, note (y)). All coin was directed to be made of sterling metal by the statute 25 Edw. 3, c. 13, now repealed. The standard was, however, subject to variation by the Crown, though the coin could not be debased or enhanced, it seems, below or above the sterling value (see *ibid.*, 278; but see *contra*, 1 Hale, P. C. 194), which has long remained fixed as at present (1 Bl. Com., 14th ed., p. 277, note (x)). As to the present standard, see pp. 467, 468, *post*.

(*u*) By the Coinage Act, 1870 (33 Vict. c. 10), s. 11 (1), (2), His Majesty is empowered, with the advice of the Privy Council, by proclamation to determine the dimensions of and design for any coin, and the denominations of coin, to be coined at the Mint. The usual course is for the proclamation to be approved by Order in Council.

(*x*) See pp. 467, 468, *post*.

(*y*) See p. 468, *post*.

(*z*) The designs for the present coins were approved by Orders in Council of the 10th December, 1901, and 13th January, 1902, approving proclamations previously issued (see Stat. R. & O. Rev., Vol. II., Coin, pp. 46—49). Notwithstanding the change in the royal title by proclamation of 4th November, 1901 (see p. 360, *ante*), all gold and silver coins current on that date, and thereafter to be coined by authority of the Crown, are to be current and lawful money until the royal pleasure is otherwise declared (Proclamation, 4th November, 1901, Stat. R. & O. Rev., Vol. I., Arms, p. 12).

(*a*) As to the power of the Crown to proclaim coins of metals other than these, see note (*t*), p. 462, *ante*.

(*b*) 33 Vict. c. 10. As to these, see note (*e*), p. 467, *post*. The dimensions and denominations of the present coins were originally authorised by various proclamations under statutes 56 Geo. 3, c. 68, and 12 & 13 Vict. c. 41, both now repealed. (For the proclamations, see Stat. R. & O. Rev., Vol. II., Coin. The gold and silver coinage of Ireland was assimilated with that of England by proclamation of the 20th December, 1825, under the statute 6 Geo. 4, c. 79, now repealed (see *ibid.*, p. 8).)

(*c*) The King's Maundy money consists of silver groats (or fourpenny pieces), threepenny, twopenny, and penny pieces (for the proclamation relating to the present designs, see note (*z*), *supra*). It is issued in each year to be distributed as a royal bounty by the King's almoner on Maundy Thursday (deriv. *mandatum*, middle English *maundee* or *maund*, a command (see Skeat, Etym. Dict. 359; Langland, Piers Plowman, ed. by Whitaker, 140, the "command" being that given in St. John's Gospel, c. 13, v. 34, "to wash one another's feet." This practice has not been observed since the reign of James II., but the distribution of alms still survives). Maundy Thursday is the Thursday before Easter.

(*d*) These are the five-pound and two-pound pieces.

of gold, silver, or bronze of any other denomination is coined at the Mint, such coin must be of a weight and fineness bearing the same proportion to the weight and fineness so specified as the denomination of such coin bears to the denomination so mentioned (*e*).

Remedy allowance.

In the making of coins, however, a remedy (or variation from the standard weight and fineness specified as above) is to be allowed of an amount not exceeding the amount specified by the Coinage Acts, 1870 and 1891 (*f*). The amount of the remedy so allowed may be diminished in the case of any coin by

(*e*) Coinage Act, 1870 (33 Vict. c. 10), s. 3. The standard weight and fineness, as set out in the First Schedule, are as follows:—

Denomination of Coin.	Standard Weight.		Least Current Weight.		Standard Fineness.
	Imperial Weight. Grains.	Metric Weight. Grams.	Imperial Weight. Grains.	Metric Weight. Grams.	
Gold:					
Five pound	616·37239	39·94028	612·50000	39·68935	Eleven-twelfths fine gold, one twelfth alloy, or millesimal fineness, 916·66.
Two pound	246·54895	15·97611	245·00000	15·87574	
Sovereign	123·27447	7·98805	122·50000	7·93787	
Half-sovereign	61·63723	3·99402	61·12500	3·96083	
Silver:					
Crown	436·36363	28·27590	—	—	Thirty-seven-fortieths fine silver, three-fortieths alloy; or millesimal fineness, 925.
Half-crown	218·18181	14·13795	—	—	
Florin	174·54545	11·31036	—	—	
Shilling	87·27272	5·65518	—	—	
Sixpence	43·63636	2·82759	—	—	
Groat or Fourpence	29·09090	1·88506	—	—	
Threepence	21·81818	1·41379	—	—	
Twopence	14·54545	0·94253	—	—	
Penny	7·27272	0·47126	—	—	
Bronze:					
Penny	145·83333	9·44984	—	—	Mixed metal, copper, tin, and zinc.
Halfpenny	87·50000	5·66990	—	—	
Farthing	43·75000	2·83495	—	—	

As to the power of the Crown to determine the current weight of legal tender by proclamation, see p. 468, *post*. The weight and fineness as specified in the schedule above were originally provided by the statute 56 Geo. 3, c. 68, by which the gold coin of Great Britain and Ireland was to hold the weight and fineness prescribed by the then existing Mint indenture—namely, that there should be 934 sovereigns and one ten-shilling piece contained in twenty pounds weight troy of standard gold, of the fineness, at the trial of the same, of twenty-two carats fine gold and two carats of alloy in the pound weight troy; and as to silver coins, that there should be sixty shillings in every pound troy of standard silver of the fineness of eleven ounces two pennyweights of fine silver and eighteen pennyweights of alloy in every pound weight troy. See also note (*t*), p. 465, *ante*.

(*f*) Coinage Act, 1870 (33 Vict. c. 10), s. 3, and Sched. I., as amended by

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proclamation issued by His Majesty with the advice of the Privy Council (*g*).

In a similar manner the Crown is empowered, within certain limits, to determine the weight at which coins are to be a current or legal tender (*h*).

Trial plates.

724. For determining the justness of the gold and silver coins of the realm issued by the Mint the Board of Trade are to cause new standard trial plates of gold and silver to be made and duly verified from time to time when necessary. The standard fineness of such plates is to be in conformity with the provisions of the Coinage Act, 1870 (*i*), and all such standard trial plates as existed on 4th April, 1870, or have been or may be made after that date, are to be in the custody of the Board of Trade (*j*). The performance of all duties

the Coinage Act, 1891 (54 & 55 Vict. c. 72), s. 2, and Schedule. The remedy so allowed is as follows:—

Denomination of Coin.	Standard of Fineness.	Remedy Allowance.		
		Weight per Piece.		Millesimal Fineness.
		Imperial Grains.	Metric Grams.	
Gold:				
Five pound	Eleven-twelfths fine gold, one-twelfth alloy, or millesimal fineness, 916·6.	1·00	0·06479	2
Two pound.		0·40	0·02592	
Sovereign		0·20	0·01296	
Half-sovereign		0·15	0·00972	
Silver:				
Crown	Thirty-seven fortieths fine silver, three-fortieths alloy, or millesimal fineness, 925.	2·000	0·1296	4
Double florin		1·678	0·1087	
Half-crown		1·264	0·0788	
Florin		0·997	0·0646	
Shilling		0·578	0·0375	
Sixpence		0·346	0·0224	
Groat or Fourpence		0·262	0·0170	
Threepence		0·212	0·0138	
Twopence		0·144	0·0093	
Penny		0·087	0·0056	
Bronze:				
Penny	Mixed metal, copper, tin, and zinc.	2·91666	0·18899	None.
Halfpenny		1·75000	0·11339	
Farthing		0 87500	0 05669	

(*g*) Coinage Act, 1870 (33 Vict. c. 10), s. 11 (3).

(*h*) *Ibid.*, s. 11 (4). See p. 472, *post.*

(*i*) 33 Vict. c. 10. For the standard fineness of the various denominations, see note (*e*) on p. 467, *ante.*

(*j*) *Ibid.*, s. 16. This provision also applies to all books, documents, and things used in connection therewith, or in relation thereto. The standard plates etc. are to be kept in such places and in such manner as the Board of Trade may from time to time direct (*ibid.*).

in relation to such trial plates is to be part of the business of the Standard Weights and Measures Department of the Board of Trade (*k*).

Board of Trade standards.

The secondary or Board of Trade standards of the various coin weights as provided by statute (*l*) are in the custody of the Board of Trade (*m*), and the master of the Mint is to cause copies of such standard weights to be made from time to time, and once at least in every year the Board of Trade and the master of the Mint must cause the copies to be compared and duly verified with the standard weights in the custody of the Board of Trade (*n*).

Verification of coin weights.

All coin weights used for trade purposes must be verified and stamped with a mark of verification by the Board of Trade; unless so stamped they are not just weights, and any person using them is liable to a fine not exceeding fifty pounds (*o*).

All weights for weighing coin which were marked at the Mint or by any proper officer before the 4th April, 1870, are to be deemed to have been marked under the Coinage Act, 1870 (*p*).

SUB-SECT. 5.—*The Trial of the Pyx.*

Regulations.

725. For the purpose of ascertaining that the coins issued by the Mint have been coined in accordance with the Coinage Acts, 1870 and 1891, a trial (termed the trial of the pyx (*q*)) must be held at least once in every year in which coins have been issued from the Mint (*r*).

The rules and procedure to be observed at such trial are regulated by Order in Council (*s*) under the Coinage Act, 1870 (*t*), and are as follows:—

A warrant, in the form provided, is issued by the Commissioners of the Treasury, signed by any two or more of them,

(*k*) Coinage Act, 1870 (33 Vict. c. 10), s. 17. See generally, title WEIGHTS AND MEASURES.

(*l*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 8, Sched. II.

(*m*) *Ibid.*, ss. 8, 34, 36. See title WEIGHTS AND MEASURES.

(*n*) Coinage Act, 1870 (33 Vict. c. 10), s. 17.

(*o*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 31. The Board of Trade must cause all such coin weights to be compared with the standard weights on payment of a fee not exceeding five shillings. If just, such weights are to be stamped with a mark approved by the Board of Trade and published in the *London Gazette* (*ibid.*, s. 39). See also title WEIGHTS AND MEASURES.

(*p*) Coinage Act, 1870 (33 Vict. c. 10), s. 20 (2).

(*q*) The *pyx* is the name given to the chest in which the sample coins are deposited for the purpose of the trial.

(*r*) Coinage Act, 1870 (33 Vict. c. 10), s. 12.

(*s*) Trial of the Pyx Order in Council, 1871, and amending Order in Council, 1901 (Stat. R. O. Rev., Vol. II., Coin, pp. 50—55). These orders apply to coins issued by any branch mints which are for the time being subject to trial.

(*t*) 33 Vict. c. 10, s. 12. His Majesty is empowered, with the advice of the Privy Council, to make regulations by order from time to time respecting the trial of the pyx and all matters incidental thereto, and in particular the following:—(1) The time and place of the trial; (2) the setting apart of coins for the trial; (3) the summoning of a jury of not less than six competent freemen of the Mystery of Goldsmiths of the City of London or other competent persons; (4) the attendance at the trial of the jury, and of the proper officers of the Treasury, the Board of Trade, and the Mint, the production of

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appointing a day for the trial to be held at the Goldsmiths' Hall, in the City of London, or, if that place is not available, then at such other place as the Commissioners think fit. This warrant is delivered to the King's Remembrancer, who presides at the trial (*a*).

Notice of trial.

Notice of the time appointed for the trial must subsequently be issued by the Treasury to the King's Remembrancer, to the Board of Trade (who are to be required to produce the standard trial plates and weights etc. at the trial), to the deputy master of the Mint, and to any other persons whose presence is thought necessary (*b*).

Jury.

726. The jury is summoned by precept issued by the Commissioners of the Treasury to the prime warden and wardens of the Goldsmiths' Company informing them of the day and hour appointed for the trial, and requesting them to summon a jury of not less than six of the company's freemen of the Mystery of Goldsmiths of the City of London, or of other competent persons, to attend at the trial (*c*).

The oath, in the form provided by the Order in Council, is administered to the jury by the King's Remembrancer or master (*d*).

Selection of coins.

727. The coins to be used at the trial must be set apart by the master or deputy master of the Mint, or, on such occasions as the Treasury think fit, by some other person appointed by them (*e*).

the coins set apart, and of the standard trial plates and standard weights; (5) the proceedings at, and conduct of, the trial, the nomination of a president, the swearing of the jury, and mode of examining the coins; (6) the recording and publication of the verdict, the custody of the record thereof, and the proceedings (if any) to be taken in consequence of such verdict. Every such order takes effect from the date named therein as if it formed part of the Coinage Act, 1870 (33 Vict. c. 10), and may be revoked or altered by any subsequent order under the Act (*ibid.*).

(*a*) Trial of the Pyx Order in Council, 1871 (Stat. R. & O. Rev., Vol. II., Coin, p. 51). If the King's Remembrancer is unable to attend the trial, his place is directed to be taken by a master of the Exchequer (see *ibid.*), and this provision would, it seems, since the amalgamation of the King's Bench, Exchequer, and Common Pleas Divisions into the King's Bench Division (see Order in Council, 16th December, 1880), apply to any of the masters attached to the latter division. The trial may be adjourned by the King's Remembrancer or master from time to time and from place to place (Trial of the Pyx Order in Council, 1901, s. 5). The trial of coins coined in England, and in any one or more branch mints, may be included in the same warrant, but separate examinations of and verdicts with regard to coins coined in England and at any branch mint must be made (*ibid.*, s. 2 (2)).

(*b*) Trial of the Pyx Order in Council, 1871 (Stat. R. & O. Rev., Vol. II., Coin, p. 52). The first three notices are to be served by delivering the same to the King's Remembrancer and at the offices of the Board of Trade and the Mint respectively (*ibid.*).

(*c*) *Ibid.*

(*d*) *Ibid.* As to the occasion when a master presides, see note (*a*), *supra*.

(*e*) Trial of the Pyx Order in Council, 1871, and amending Order in Council, 1901, s. 3 (Stat. R. & O. Rev., Vol. II., Coin, pp. 53, 55). Any person so appointed shall, so far as his appointment extends, act for the purpose under the Trial of the Pyx Orders in Council, 1871 and 1901, in the place of the master or deputy master of the Mint, or in the case of a branch mint, the master of

In the case of gold coins, one coin is to be set apart out of each two thousand ready for issue (*f*), and, in the case of silver coins, one coin out of each journey weight of sixty pounds troy (*g*). These coins must be sealed up in separate packets at the Mint before being taken to the trial and must be so produced there (*h*).

The trial.

The jury are directed to ascertain that the number of coins in each packet corresponds with the numbers represented by the officers of the Mint, and to take from each packet so many coins as they think necessary for the purposes of the trial.

Each of these coins must be weighed by or in the presence of the jury to ascertain whether they are within the remedy allowed as to weight.

The coins so taken out and weighed must be melted by the jury and the resulting ingot assayed and compared with the standard trial plate to ascertain whether it is within the remedy allowed as to fineness (*i*).

The residue of the coins must then be weighed by the jury in bulk to ascertain whether they are within the remedy as to weight, and such number of gold and silver coins are then to be taken therefrom as the jury think fit and assayed separately (*k*).

Findings of the jury.

728. The finding of the jury must show or specify:—(1) Whether the ingot (*l*) (obtained and assayed by them in the manner described above) is or is not within the prescribed remedy or variation from the standard of weight and fineness (*m*); (2) the amount of variation (if any) from such standard weight and fineness; (3) the weight and millesimal fineness of the coins which have been separately weighed and assayed (*n*).

Authentication of verdict.

The verdict of the jury must be reduced into writing by the King's Remembrancer or master presiding, who must authenticate it by reading it aloud publicly in the hearing of the jury. The written verdict must then be signed by each of the jury and the president, and, after being attached to the Treasury warrant, must be taken by or delivered to the King's Remembrancer and filed or deposited of record in his office (*o*).

the mint or the deputy master of the branch mint (*ibid.*). In the application of the provisions of the Trial of the Pyx Order in Council, 1871, to a branch mint as to the setting apart of coins for trial, the deputy master is to be construed to be the deputy master of the branch mint (*ibid.*, s. 2 (3)).

(*f*) *Ibid.*

(*g*) Trial of the Pyx Order in Council, 1871 (Stat. R. & O. Rev., Vol. II., Coin, p. 53).

(*h*) *Ibid.*

(*i*) *Ibid.* The Order in Council refers to the Coinage Act, 1870 (33 Vict. c. 10), only, but the remedy as to weight and fineness is now regulated by the Coinage Act, 1891 (54 & 55 Vict. c. 72). See p. 468, *ante*.

(*k*) *Ibid.*

(*l*) This word should be in the plural, it seems, as under the directions there would be two ingots, one of gold and one of silver.

(*m*) See note (*i*), *supra*.

(*n*) Trial of the Pyx Order in Council, 1871 (Stat. R. & O. Rev., Vol. II., Coin, p. 53).

(*o*) *Ibid.*, pp. 51, 53.

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The King's Remembrancer must cause a copy of the verdict and warrant to be delivered to the Commissioners of the Treasury to be kept in the Treasury. The Commissioners of the Treasury must cause two other copies to be made and delivered, one to the Board of Trade to be kept and preserved there, the other to the deputy master of the Mint to be kept and preserved at the Mint (*p*).

Publication of verdict.

The Commissioners of the Treasury must also cause the verdict to be published in the *London Gazette* (*q*).

These provisions as to the trial of the pyx apply and extend to the trial of any coins coined at any branch of the Mint which are for the time being subject to the trial of the pyx (*r*).

SUB-SECT. 6.—*Calling in Light Coin.*

Calling in light coins.

729. His Majesty, with the advice of the Privy Council, may from time to time by proclamation determine the weight (not being less than the least current weight specified in the Coinage Act, 1870 (*s*)) below which a coin, whether diminished in weight by wear or otherwise, is not to be a current or legal tender; and call in coins of any date or denomination, or any coins coined before the date in the proclamation mentioned (*t*).

Defacing.

Any gold coin below such least current weight (*a*), or called in by proclamation, and which is tendered to any person in payment, is directed to be cut, broken, or defaced by such person or others, and the loss is to be borne by the person tendering the same (*b*); but if the coin so cut, broken, or defaced is not below the current weight, or has not been called in by any proclamation, the person cutting, breaking, or defacing the same is to receive it in payment according to its denomination (*c*). Any dispute arising under this provision may be determined by a summary proceeding (*d*).

Uncalled coins.

730. Light gold coins not called in by proclamation, and which are below such least current weight, must, if they have not

(*p*) Trial of the Pyx Order in Council, 1871 (Stat. R. & O. Rev., Vol. II., Coin, p. 54).

(*q*) *Ibid.*

(*r*) Trial of the Pyx Order in Council, 1901, s. 2 (1). See also note (*i*) on p. 464 and note (*s*) on p. 469, *ante*.

(*s*) The power of decrying or calling in coins is also enjoyed by the Crown at common law (see 1 Hale, P. C. 197; 1 Bl. Com., 14th ed., 278).

(*t*) Coinage Act, 1870 (33 Vict. c. 10), s. 11 (4), (5). The following coins have been called in by proclamation, and are therefore (*semble*) no longer legal tender: Silver coins current before the 22nd June, 1816; copper coinage coined previously to December, 1860; pre-Victorian gold coins (see proclamations 1st March, 1817; 13th May, 1869; 22nd November, 1890, Stat. R. & O. Rev., Vol. II., Coin, pp. 3, 21, 26). No proclamation appears to have been issued determining the least current weight.

(*a*) 33 Vict. c. 10; see p. 466, *ante*.

(*b*) Coinage Act, 1870 (33 Vict. c. 10), s. 7. No penalty is attached to the non-performance of this direction, which appears to be seldom carried out.

(*c*) *Ibid.*

(*d*) *Ibid.* As to summary proceedings under the Act, see note (*f*), p. 463, *ante*.

Payment for.

been illegally dealt with (*e*), be exchanged or paid for by or on behalf of the Mint at their nominal value. Such coins must be tendered at the Bank of England in London during business hours, in parcels of a nominal value of not less that £100, which must be left at the Bank before exchange or payment for such reasonable time as may be necessary to determine whether any coin has been illegally dealt with (*f*).

The expense of exchanging light gold coins is met by the interest of a fund charged upon and issued out of the Consolidated Fund, under statutory authority for that purpose (*g*).

SUB-SECT. 7.—*Importation of Coins.*

Foreign coins.

731. At common law the Crown enjoys the exclusive right of legitimating, or making current, foreign coins by proclamation (*h*), and this right, together with the right of prohibiting the importation of foreign coins (*i*), has now been placed upon a statutory basis (*k*). The right of legitimating foreign coin does not appear to have been exercised with regard to the United Kingdom (*l*).

Prohibited coins.

732. Certain coins and classes of coins are prohibited from being imported or brought into the United Kingdom, and if so imported or brought are forfeited and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct (*m*). This prohibition applies to the following coins:—(1) False money

(*e*) Coins impaired, diminished, or lightened otherwise than by fair wear and tear, or defaced by having any name, word, device, or number stamped thereon, whether diminished or lightened thereby or not, are to be deemed to have been illegally dealt with for the purposes of this provision; and loss of weight, in a sovereign or half-sovereign, exceeding three grains from the standard weight is *primâ facie* evidence that the coin has been impaired, diminished etc. otherwise than by fair wear and tear (Coinage Act, 1891 (54 & 55 Vict. c. 72), s. 1 (2), (3)).

(*f*) Order in Council, 16th March, 1892 (see Stat. R. & O. Rev., Vol. II., Coin, p. 27), issued under the Coinage Act, 1891 (54 & 55 Vict. c. 72), s. 1 (1).

(*g*) The sum of £400,000 was directed to be charged on and issued out of the Consolidated Fund in the year 1892, and, so far as it was not immediately required, to be invested as the Treasury might direct and the interest applied towards meeting the expenses of the exchange of light gold coins by the Mint under the above provision (Coinage Act, 1891 (54 & 55 Vict. c. 72), s. 1 (4)). In 1893 a further sum of £250,000 was directed to be charged on, and from time to time issued out of, the Consolidated Fund subject to the same provisions (Coinage Act, 1893 (56 & 57 Vict. c. 1), s. 1).

(*h*) 1 Bl. Com., 14th ed., 278. It is said that at common law comparison must be had with the standard of our own coin, otherwise the consent of Parliament would be necessary (*ibid.*).

(*i*) There can be little doubt that the Crown enjoys this right at common law, since it enjoys the general right of decrying or making coin no longer current (see *ibid.*, 278).

(*k*) As to the power of legitimating foreign coin conferred upon the Crown by s. 11 (7) of the Coinage Act, 1870 (33 Vict. c. 10), see note (*t*), p. 462, *ante*. Foreign coin may be prohibited by proclamation under the Customs Amendment Act, 1886 (49 & 50 Vict. c. 41). See p. 474, *post*.

(*l*) This right is, however, frequently exercised in foreign possessions where there is a native currency already in existence.

(*m*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 42.

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or counterfeit sterling (*n*); (2) silver of the realm, or any money purporting to be such, not being of the established standard in weight or fineness (*o*); (3) imitation coins (*p*), unless permitted in a particular instance by the Commissioners of Customs acting under the direction of the Treasury (*q*); and (4) coins coined in a foreign country and prohibited from importation by proclamation (*r*).

Importation of coins.

The importation into the United Kingdom of all coins coined in any foreign country other than gold or silver coins is prohibited (*s*).

The importer, owner, or consignee of any bullion or coin imported into Great Britain or Ireland, and not being small parcels forming part of the baggage of passengers, must within ten days after the landing of the same deliver to the collector, or other proper officer of customs, a full and true account thereof including its weight and value (*t*). Neglect of this duty entails a forfeit of twenty pounds (*a*).

SECT. 12.—*Weights and Measures.*

Standards.

733. At common law the Crown, it is said, enjoyed the right of regulating the standards of weights and measures (*b*), but these

(*n*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 42.

(*o*) *Ibid.*

(*p*) As defined by the Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 2 (1). If not British, the following are imitation coins within the meaning of the Act:—(1) Any piece of gold, silver, copper, or bronze, or of metal or mixed metal, purporting to be a British coin, or a token for British money, or bearing any word or device which indicates or may reasonably be taken to indicate that the holder is entitled to demand any value in British money denoted thereon; (2) any medal, cast, coin, or other like thing made wholly or partially of metal or any metallic combination, and resembling in size, figure, and colour any British coin, or having thereon a device resembling any device on any British coin, or being so formed that it can by gilding, silvering, colouring, washing, or other like process be so dealt with as to resemble any British coin (*ibid.*, s. 2 (3), (a), (b)). In this section the term "British coin" means any coin coined in or for any of the King's mints, or made lawfully current by proclamation or otherwise in any part of the King's dominions, whether within the United Kingdom or otherwise. The term "British money" means money expressed in the terms of any British coin (*ibid.*, s. 2 (4)).

(*q*) *Ibid.*, s. 2 (2). Permission may be so granted if the Commissioners are satisfied that the importation is for the purposes of knowledge or art or any exhibition or collection, or for any lawful purpose, and that the imitation coin is not likely to circulate as current coin, or to be otherwise used for deceiving the public (*ibid.*).

(*r*) Under the Customs Amendment Act, 1886 (49 & 50 Vict. c. 41), s. 2, which empowers His Majesty to make and revoke proclamations prohibiting the importation of such coins coined in a foreign country as are specified in the proclamation.

(*s*) Proclamation, 25th March, 1887, issued with the advice of the Privy Council (see Stat. R. & O. Rev., Vol. II., Coin., p. 49).

(*t*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 49.

(*a*) *Ibid.* For the various offences relating to the coinage, see title CRIMINAL LAW AND PROCEDURE.

(*b*) 1 Bl. Com., 14th ed., 274. This right is referable to that enjoyed by the Duke of Normandy (*ibid.*), but has been doubted as to England (*ibid.*, 276, note (16)).

have been fixed by Parliament from very early times (*c*), and the present standards, together with the means by which their correctness and uniform use throughout the Kingdom is ensured, are now entirely regulated by statute (*d*). SECT. 12. Weights and Measures.

SECT. 13.—*The Crown as Parens Patriæ.*

734. As liege lord and protector of his subjects (*e*), the Sovereign enjoys the prerogative right of taking care of the persons and estates of infants, idiots, lunatics and insane people, and of superintending charities. Care of infants, etc.

735. The protection and care of infants and their estates, and the appointment and removal of custodians or guardians, fell within the general supervision and control of the Lord Chancellor, and jurisdiction in all such matters is now expressly assigned to the Chancery Division of the High Court of Justice (*f*). Wardship.

736. The care and commitment of the custody of the persons and estates of idiots and lunatics (*g*), which has belonged to the Crown at common law from very early times (*h*), is invariably delegated to the Lord Chancellor by warrant under the sign manual, though it may, it seems, be delegated to any other high official, the Lord Chancellor enjoying no inherent jurisdiction in relation thereto (*i*). Idiots and lunatics.

(*c*) By the laws of Edgar one uniform measure, which was to be kept at Winchester, was to be observed throughout the land; and by Magna Carta (see Stubbs' Sel. Chart., p. 292) and many subsequent statutes standards of uniformity have been established (1 Bl. Com., 274, 276, note (16); 4 *ibid.* 423).

(*d*) As to the present law, see title WEIGHTS AND MEASURES.

(*e*) See p. 339, *ante*.

(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34; and see title INFANTS. Upon the abolition of the Court of Wards and Liveries with the feudal tenures in 1660, by statute 12 Car. 2, c. 24, the care of infants by the King as feudal lord became extinct, but resulted to the King in his Court of Chancery (3 Bl. Com., 14th ed., 426, 427). As to infants generally, see title INFANTS AND CHILDREN.

(*g*) At common law idiots are persons born without any glimmering of reason, including persons born deaf, dumb, and blind; whilst lunatics are persons who have become temporarily or permanently deprived of their reason, or *non compos mentis*, by disease, grief, or accident after birth, including persons becoming deaf, dumb, and blind after birth (1 Bl. Com., 14th ed., 303, 304).

(*h*) The right of the Crown to the custody of the lands of idiots and lunatics was declared by the statute Prerogativa Regis (*incert. temp.*, cc. 11, 12; 17 Edw. 2, stat. 2, cc. 9, 10, Ruff.); and see note (*p*) on p. 371, *ante*. This statute is declaratory only of the common law (Bac. Abr., tit. Idiot, C; *Oxenden* v. *Compton* (*Lord*) (1793), 2 Ves. 69, 71). In the case of idiots, the King had the custody of their lands (except copyholds) and chattels (see as to copyholds and chattels, *Beverley's Case* (1603), 4 Co. Rep. 123 b, 126 a, b; Fitz. Nat. Brev. 232) without waste, and subject to finding them necessaries, and to the duty of restoring the property to the heirs. In the case of lunatics, the Crown acted merely as trustee, being bound to sustain the lunatic and his family and restore the residue to the lunatic on his return to reason, taking nothing for his own use (statute Prerogativa Regis, *supra;* 1 Bl. Com., 14th ed., 304; *Frances' Case* (1536), Moore (K. B.), 4; *Lysaght* v. *Royse* (1804), 2 Sch. & Lef. 151).

(*i*) See *Oxenden* v. *Compton* (*Lord*) (1793), 2 Ves. 69, 72; *Sheldon* v. *Fortescue Aland* (1731), 3 P. Wms. 104, 107, note A, 108; 1 Bl. Com., 14th ed., 303. The Chancellor enjoys administration only, and not general jurisdiction (see *ibid.*), and therefore appeal lay from his orders to the King in Council, and not to the House of Lords (see Lords' Journal, 14th February, 1726) until transferred to the Court of Appeal by the Judicature Act, 1873 (36 & 37 Vict. c. 66),

SECT. 13. The Crown as Parens Patriæ.

Matters relating to the confinement of idiots and lunatics, whether so found by inquisition or not, and the custody of their property by means of committees, are now principally regulated by statute (*k*), and are placed under the supervision of the Commissioners in Lunacy, subject to the general jurisdiction of the judge in lunacy (*l*).

Charities.

In matters relating to charities the Lord Chancellor, as keeper of the King's conscience, exercises the privileges of the Sovereign (*m*), and jurisdiction in such matters is now expressly assigned to the Chancery Division of the High Court of Justice (*n*), whilst the general administration of the Acts relating to charitable trusts is placed under the supervision of the Charity Commissioners (*o*).

SECT. 14.—*Royal Grants.*

SUB-SECT. 1.—*How Effected.*

Crown grants.

737. At common law grants by the Crown are generally void unless made under the Great Seal (*p*). Thus, grants of freehold interests in land, honours, franchises and liberties, offices in fee or for life, and, it is said, chattels real, may not be granted by the Crown at common law except by matter of record (*q*), namely, by charter or letters patent under the Great Seal and enrolled either on the patent-rolls or the close-rolls (*r*). It seems, however, that certain leases could be validly granted under the Exchequer seal (*s*).

s. 18 (5)). An order relating to the estate of an idiot may be made after the latter's death (see *Ex parte Grimstone* (1772), Amb. 706).

(*k*) As to idiots, see the Idiots Act, 1886 (49 & 50 Vict. c. 25); as to lunatics, the Lunacy Act, 1890 (53 Vict. c. 5); and see, generally, title LUNATICS AND PERSONS OF UNSOUND MIND.

(*l*) *I.e.*, the Lord Chancellor intrusted with the care and commitment by sign manual acting alone or jointly with any such or more of the judges of the Supreme Court who may be so intrusted (Lunacy Act, 1890 (53 Vict. c. 5), s. 108 (1)). See, generally, title LUNATICS AND PERSONS OF UNSOUND MIND.

(*m*) 3 Bl. Com., 14th ed., 426, 427.

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3). Where a charity is established by gift and there are no regulations as to its exercise, the Court has a general jurisdiction, it is said; and the Attorney-General, at the relation of some informant styled the *relator*, may commence proceedings *ex officio* to have the charity applied and regulated. But where the charity is established and regulated by charter or Act of Parliament there is, it seems, no general jurisdiction, but only in case of abuse, when the charitable trust may be enforced in a suit by the Attorney-General on the relation of a third party (see Chitty, Prerogatives of the Crown, 161; 3 Bl. Com., 14th ed., 426, 427).

(*o*) See generally as to charities, title CHARITIES, Vol. IV., p. 101.

(*p*) 2 Bl. Com., 14th ed., 346, and see the references in the next note. As to the manner of passing instruments under the Great Seal, see Vol. VII., Part VI., sect. 1, sub-sect. 2.

(*q*) *Smith* v. *Lane* (1596), 2 Co. Rep. 16 b; Vin. Abr. tit. Prerog. C, b; Com. Dig. Patent C, 2; Bl. Com., *supra;* Vin. Abr. tit. Prerog. F, b. An exemplification or *constat* of the roll under the Great Seal is to be of the same force and effect, when pleaded, as the letters patent themselves (3 & 4 Edw. 6, c. 4, s. 2).

(*r*) 2 Bl. Com., 14th ed., 346. Instruments enrolled on the *patent-rolls* are addressed to subjects at large, whilst *close-roll* patents are directed to particular persons for particular purposes and sealed on the outside (*ibid.*); see also as to the patent rolls, Scargill-Bird, Guide to Public Records (R. S.), 34, 35; and as to the close-rolls, The Close Rolls (Rec. Com.), Introduction.

(*s*) *Smith* v. *Lane* (1596), 2 Co. Rep. 16 b; *Predyman* v. *Wodry* (1605), Cro. Jac. 109; Com. Dig. tit. Patent, C, 3.

Grants of lands in the Duchy and County Palatine of Lancaster were required to be passed under the seals of the duchy and county palatine respectively (*t*).

Personalty, such as goods or choses in action, did not require the authority of the Great Seal, but could legally be passed under the Privy Seal (*a*). But now the necessity for the use of the Privy Seal has been abolished in all cases (*b*).

Grants of property vested in the King in his body natural required, in general, the same formalities as grants of property vested in him in his body politic (*c*).

Instruments under the Great Seal.

738. A warrant under the royal sign manual, countersigned in the manner specified, is now (*d*) a sufficient authority for passing any instrument (*e*) under the Great Seal of the United Kingdom (*f*); and instruments which before the 28th July, 1884, could be passed under the Great Seal on any other authority may continue to be so passed (*g*).

Common law grants to the King.

739. At common law grants to the King of a freehold interest or term of years, or a surrender, must be made by matter of record, as by deed enrolled (*h*), and grants to the King in his body natural require the same formalities as grants to him in his body politic (*i*). But surrenders of copyholds to the King as lord are good, it seems, if made in accordance with the custom of the manor (*k*), and the King may take goods and choses in action without matter of record (*l*).

(*t*) 4 Co. Inst. 209; Com. Dig. tit. Patent C, 4; *Case of the Duchy of Lancaster* (1561), Plowd. 212, 218. A presentation to a church, the advowson of which belonged to the duchy, might, it seems, pass under the Great Seal, though a grant of the next avoidance required the duchy seal (see Vin. Abr. tit. Prerog. D, b).

(*a*) Vin. Abr. tit. Prerog. F, b; Com. Dig. Patent C, 5; there seems to be some doubt how far writing was necessary (see Bro. Abr. tit. Prerog., pl. 61). Choses in action could, it seems, always be assigned by the Crown by express words, though at common law they could not be assigned by a subject so as to pass the right to the grantee to sue in his own name (see *Ford and Sheldon's Case* (1606), 12 Co. Rep. 2, Ex. Ch.; Bro. Abr. tit. Prerog. 40; Co. Litt. 232 b, note (1); Vin. Abr. tit. Prerog. M, b). But this doctrine appears to have applied only to a debt or liquidated demand, and not to a right of action for damages (see Vin. Abr. tit. Prerog. M, b; Bro. Abr. Choses in Action, pl. 11).

(*b*) Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 3. This section was repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), Schedule, but not so as to revive the use of the Privy Seal (see *ibid.*, s. 1). In cases where writing is required such grants would now, it seems, pass under the sign manual.

(*c*) *Case of the Duchy of Lancaster, supra;* and see Vol. VII., Part VII., sect. 6.

(*d*) As from the 28th July, 1884.

(*e*) As to what the term "instruments" includes, see Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 2 (1).

(*f*) *Ibid.*

(*g*) *Ibid.*

(*h*) *Case of the Duchy of Lancaster, supra;* Bro. Abr. tit. Prerog. pl. 41, 56, 57, 93; Vin. Abr. tit. Prerog. Z, c.

(*i*) *Case of the Duchy of Lancaster, supra.*

(*k*) See *Lee* v. *Boothby* (1665), 1 Keb. 720. See title COPYHOLDS.

(*l*) Vin. Abr. tit. Prerog. Z, c; Bro. Abr. tit. Prerog. pl. 36, 40, 50; *ibid.*, tit. Choses in Action, pl. 4. Choses in action could always be assigned by or to the

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Counter-signing grants.

740. Grants or warrants which can be made under the sign manual ought, it is said, to be countersigned by one of the principal Secretaries of State, or by the Lords of the Treasury, except where an Act of Parliament directs that the King may do a certain thing under the sign manual, when they need not, it seems, be so countersigned (*m*).

Departmental grants.

741. Some grants might, it seems, pass through certain offices, such as the Admiralty or Treasury, under the sign manual without the authority of the Signet, the Great Seal, or the Privy Seal (*n*). But now the necessity for the use of the Signet in passing documents under the Great Seal and the Privy Seal has in all cases been abolished (*o*).

Statutory regulations.

742. The common law rules relating to Crown grants have been largely superseded by statute (*p*).

Where a grant is directed by statute to be made in a particular manner, it is doubtful whether it can be legally effected in any other manner (*q*); but in the absence of statutory provisions the common law rules are, it seems, still applicable.

Money grants.

743. Grants of public money out of the Consolidated Fund are now made on the authority of an Act of Parliament or resolution of the House of Commons, and the final issue of such money by the Treasury is authorised by order under the sign manual countersigned by any two or more of the Treasury Commissioners (*a*).

Fees on grants.

744. Grants by the Crown are subject, in certain cases, to fees which are payable by means of impressed stamps (*b*).

King (see note (*a*), p. 477, *ante*, and the authorities there cited), but by the statute 7 Jac. 1, c. 15, only such debts "as before grew due to the King's debtor or accountant" may be assigned to the King, and assignments of debts in contravention of the Act are void.

(*m*) Com. Dig. tit. Patent, C, 7.

(*n*) 2 Bl. Com., 14th ed., 347. As to the passage of documents under the Great Seal, see reference in note (*p*) on p. 476, *ante*.

(*o*) The necessity for the use of the signet was abolished by the Great Seal Act, 1851 (14 & 15 Vict. c. 82). As to the abolition of the use of the Privy Seal, see note (*b*), p. 477, *ante;* as to the former use of the signet, see Com. Dig. tit. Patent, C, 6.

(*p*) For the disposal of Crown lands, and the Crown private estates, see Vol. VII., Part VII.

(*q*) *Southampton's* (*Earl*) *Case* (1541), Dyer, 50 a.

(*a*) See title REVENUE. Formerly such grants could legally be made under the Great or Privy Seal (see 2 Co. Inst. 555; *Devonshire's* (*Earl*) *Case* (1606), 11 Co. Rep. 89 a, 92 a), but the usual course was to issue patents or privy seals to the Treasurer authorising him to issue warrants for the money (see Gilbert, Court of Exchequer, 139, 140).

(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 2, Sched. I. As to grants of honours, dignities, or precedence, see title DIGNITIES; as to bishoprics see p. 392, *ante;* as to franchises, liberties, and privileges, see p. 489, *post;* as to grants of Crown lands, see Vol. VII., Part VII.; as to names, arms or armorial ensigns, see titles NAME, CHANGE OF; WILLS; as to exemplifications and *constats* of grants and letters patent, see Vol. VII., Part VI.; as to warrants under the sign manual, see Vol. VII., Part VI.

Effect of grants.

745. The Sovereign being a corporation sole, grants by him bind his successors though they are not named (*c*). Similarly a grant to the Sovereign simply is sufficient to pass a fee simple estate (*d*).

Operation.

746. Grants under the Great Seal require no delivery and take effect from the date expressed in the grant (*e*); but they are effectual even if undated, since the sealing and enrolment are sufficient (*f*).

Construed favourably.

747. Contrary to the ordinary rule applicable to grants by a subject (*g*), grants by the Crown are construed most favourably for the Crown (*h*). Thus, a Crown grant of a manor with all lands accepted or reputed as parcel thereof will only pass such lands as have belonged to the manor immemorially and of truth and right (*i*), and under the grant of a manor or land with the appurtenances the right to knight's fees, advowsons, and dowers does not pass (*k*).

Nor will a grant of "franchises" generally pass the right to treasure trove (*l*), or a grant of "land" pass the right to mines (*m*), unless they are expressly mentioned. Nor will flotsam, jetsam, and lagan (or ligan) pass under a grant of "wreck" (*n*); and a grant of land "and the mines therein contained" will not be sufficient to pass the right to royal mines of gold and silver (*o*), the rule in such cases being that general words will not pass prerogative rights by implication (*p*), or unless expressly mentioned (*q*); and

(*c*) Bac. Abr. tit. Prerog. E, 2; Co. Litt. 9. *Case of the Duchy of Lancaster* (1561), Jenk. 5th Century, Case LXXXIV., 224.

(*d*) Bac. Abr. tit. Prerog. E, 3.

(*e*) Vin. Abr. tit. Prerog. G, b, 3.

(*f*) *Ibid.*

(*g*) That grants are to be taken most strongly against the grantor (2 Bl. Com., 14th ed., 346). See, generally, title DEEDS AND OTHER INSTRUMENTS.

(*h*) *Ibid.*; *A.-G.* v. *Ewelme Hospital* (1853), 17 Beav. 366; *Knight's Case* (1588), 5 Co. Rep. 56 a; Vin. Abr. tit. Prerog. O, c; Com. Dig. tit. Grant, G, 12; Bac. Abr. tit. Prerog. E, 4.

(*i*) 2 Roll. Abr. 186. But see *Gennings* v. *Lake* (1628), Cro. Car. 169, where a grant of a messuage and lands *dicto messuagis spectantia vel cum eo dimissa* was held to pass lands enjoyed with the manor for a convenient time.

(*k*) Statute Prerogativa Regis (of uncertain date, 17 Edw. 2, c. 17; 17 Edw. 2, stat. 2, c. 15, Ruff.). This statute does not extend to lay advowsons such as the nomination of the master of an almshouse (see *A.-G.* v. *Ewelme Hospital* (1853), 17 Beav. 366).

(*l*) *A.-G.* v. *British Museum* (*Trustees*), [1903] 2 Ch. 598. And see Vol. VII., Part VII.

(*m*) *Woolley* v. *A.-G. of Victoria* (1877), 2 App. Cas. 163.

(*n*) See Vol. VII., Part VIII., and title ADMIRALTY, Vol. I., p. 76.

(*o*) *Case of Mines* (1568), Plowd. 310, 336, Ex. Ch. But a grant of all coal mines "within the commons, waste grounds, or marshes" within a lordship, with a proviso that the grant should be construed strictly against the Crown and most strictly and beneficially for the grantee, was held to pass coal lying under the foreshore of an estuary and forming part of the manor (*A.-G.* v. *Hanmer* (1858), 27 L. J. (CH.) 837).

(*p*) See the *Banne Fishery Case* (1610), Dav. Ir. 55, 57.

(*q*) *A.-G.* v. *British Museum* (*Trustees*), *supra*, 612; Vin. Abr. tit. Prerog. C, c; Com. Dig. tit. Grant, G, 7. As to rights embraced by words of reference to a previous grant, see *A.-G.* v. *Downshire* (*Marquis*) (1818), 5 Price, 269; *Dyke* v.

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where under a general term both things royal and things base may be included, only the latter will pass (*r*).

But rights which do not form part of the prerogative will sometimes pass though not expressly mentioned. Thus, under a grant to burgesses of a town with all its appurtenances, the Crown being the owner of the soil and the right to toll-traverse, the right to toll-traverse has been held to pass (*s*). And under a grant of a rectory, all churches and vicarages belonging thereto being expressly excepted, the right to a perpetual curacy passed as not forming part of the exception (*t*). No definite rule can, however, be laid down in such cases, each being governed by its own merits (*a*).

Where a grant by the Crown cannot take effect without some further act or grant on the part of the Crown, necessary to its enjoyment, the latter will not be implied and the grant is void. Thus, land granted to an alien, at a time when aliens could not hold land, would not have enured to make him a denizen (*b*).

Rules of construction.

748. The general rule is, however, capable of important relaxations in favour of the subject. Thus, if the intention be obvious, a fair and liberal interpretation must be given to the grant to enable it to take effect (*c*). And the operative part, if plainly expressed, may take effect notwithstanding qualifications in the recitals (*d*).

The grant will also be construed in favour of the subject where it is expressed to be made, not at the solicitation of the latter, but (as is frequently the case) "*ex speciali gratiâ, certâ scientiâ, et mero motu regis*" (*e*).

If the grant is for valuable consideration it must be construed strictly in favour of the grantee, for the honour of the King (*f*); and where two constructions are possible, one valid and

Walford (1846), 5 Moo. P. C. C. 434. See also the *Banne Fishery Case* (1610), Dav. Ir. 55, where a grant of land and *piscarias, piscationes, aquas, aquarum cursus etc. ac omnia alia hæreditamenta exceptis tribus partibus piscationis fluminis de Banne* was held not to pass the right of the Crown to the remaining quarter of the several fishery in the tidal portion of the river.

(*r*) *Basket* v. *Cambridge University* (1758), 1 Wm. Bl. 105, 118.

(*s*) *Brett* v. *Beales* (1829), 1 Mood. & M. 416, 426. As to tolls generally, see titles HIGHWAYS; MARKETS AND FAIRS.

(*t*) *Arthington* v. *Chester* (*Bishop*) (1790), 1 Hy. Bl. 418.

(*a*) As to the right to take tolls under the grant of a fair, see *Egremont* (*Earl*) v. *Saul* (1837), 6 Ad. & El. 924; *Stamford Corporation* v. *Pawlett* (1830), 1 Cr. & J. 57. As to what passes under a grant of tithes, see *Holdsworth* v. *Fairfax* (1834), 3 Cl. & Fin. 115, H. L.; *A.-G.* v. *Eardley* (*Lord*) (1820), 8 Price, 39; *Lucton Free School* (*Governors*) v. *Scarlett* (1828), 2 Y. & J. 330, affirmed *sub nom. Scarlett* v. *Lucton Free School* (*Governors*) (1836), 4 Cl. & Fin. 1, H. L. A specific portion of Crown lands cannot be claimed under general words in a grant (see *Parmeter v. A.-G.* (1813), 10 Price, 412, H. L.).

(*b*) *Knight's Case* (1588), 5 Co. Rep. 54 b; Bro. Abr. tit. Patents, pl. 62; and see Vin. Abr. tit. Prerog. G, c; *Basket* v. *Cambridge University* (1758), 1 Wm. Bl. 105, 118; *Englefield's Case* (1591), 7 Co. Rep. 11 b; 2 Bl. Com., 14th ed., 347.

(*c*) 2 Co. Inst. 496, 497.

(*d*) *Leyat's Case* (1612), 10 Co. Rep. 109 a.

(*e*) *Allen Wood's Case* (1600), 1 Co. Rep. 40; *Leyat's Case, supra*; Com. Dig. tit. Grant, G, 12; Vin. Abr. tit. Prerog. E, c. (3); 2 Bl. Com., 14th ed., 347.

(*f*) 2 Co. Inst. 496, 497; *Moleyn's* (*Sir John*) *Case* (1598), 6 Co. Rep. 5 b; *Whistler's Case* (1612), 10 Co. Rep. 63 a, at 65 a.

the other void, that which is valid ought to be preferred (*g*), for the honour of the King ought to be more regarded than his profit (*h*). Where, however, two interpretations may be given to the grant, both of which are good, that which is most favourable to the Crown is in many cases preferred (*i*).

Passports.

Licences and passports to alien enemies to trade or reside in British territory during war are an exception to the general rule, and are construed liberally for the grantee (*k*).

User.

Evidence of user may be adduced to explain the meaning of a grant, and in such cases a more liberal interpretation will frequently be given to it (*l*). Thus evidence of acts of ownership will be admitted to show that the foreshore passed under the grant of an adjacent manor (*m*), or under a grant of land (*n*), though not expressly mentioned.

Uncertainty.

749. Where there is a decided uncertainty as to what is granted, the grant will in general be void, not only as against the grantee, but against the King also, because a presumption of deceit is raised (*o*). Thus a grant of a parcel of lands without describing what parcel (*p*), or of debts accrued within a certain period without specifying what debts (*q*), or a grant of a felon's goods (made at a time when felons' goods were forfeited to the Crown) without specifying the manor or county (*r*), are void for uncertainty.

But the common law rule, *Id certum est quod certum reddi potest*, obtains with regard to such grants (*s*), and a grant with such privileges as a named person enjoyed (*t*), or a grant of a manor to hold "*adeo plene et integre*" as it came into the hands of the King by the attainder of a named person or under such conditions as are contained in certain letters patent (*a*), will not be void for uncertainty.

(*g*) *Bewley's Case* (1611), 9 Co. Rep. 130 b; *Moleyn's* (*Sir John*) *Case* (1598), 6 Co. Rep. 5 b; *Churchwardens of St. Saviour's, Southwark* (1613), 10 Co. Rep. 66 b.

(*h*) Com. Dig. tit. Grant, G, 12; *Rutland's* (*Earl*) *Case* (1608), 8 Co. Rep. 55 a.

(*i*) *Alton Woods' Case* (1600), 1 Co. Rep. 45 a, 53 a; *Rutland's* (*Earl*) *Case*, *supra*.

(*k*) *Flindt* v. *Scott* (1814), 5 Taunt. 674, Ex. Ch.; *Vaughan* v. *Lemcke* (1825), 7 Dow. & Ry. (K. B.) 236. See also title ALIENS, Vol. I., at p. 311.

(*l*) See *Sutton Harbour Improvement Co.* v. *Plymouth Guardians* (1890), 63 L. T. 772, where usage extending over the last 150 years was admitted to explain the meaning of a charter of 1440.

(*m*) *A.-G.* v. *Jones* (1863), 2 H. & C. 347; *Calmady* v. *Rowe* (1848), 6 C. B. 861; *Le Strange* v. *Rowe* (1866), 4 F. & F. 1048; *Re Walton-cum-Trimley Manor, Ex parte Tomline* (1873), 28 L. T. 12; *Healy* v. *Thorne* (1870), I. R. 4 C. L. 495; *Re Belfast Dock Act, Ex parte Ranfurly* (*Earl*) (1867), I. R. 1 Eq. 128; *Lord Advocate* v. *Young* (1887), 12 App. Cas. 544; *Hamilton* v. *A.-G. for Ireland* (1880), 5 L. R. Ir. 555; *Daly* v. *Murray* (1885), 17 L. R. Ir. 185, C. A.

(*n*) *Hastings Corporation* v. *Ivall* (1874), L. R. 19 Eq. 558; *Brew* v. *Haren* (1877), I. R. 11 C. L. 198, Ex. Ch.

(*o*) Vin. Abr. tit. Prerog. F, c.; Bac. Abr. tit. Prerog. F, 2.

(*p*) *Stockdale's Case* (1611), 12 Co. Rep. 86; *Parmeter* v. *A.-G.* (1813), 10 Price, 412, H. L.

(*q*) *Stockdale's Case*, *supra*.

(*r*) Com. Dig. tit. Grant, G, 6.

(*s*) Com. Dig. tit. Grant, G, 5; Vin. Abr. tit. Prerog. R, c.

(*t*) *Darcy's* (*Lord*) *Case* (1596), Cro. Eliz. 512, 513.

(*a*) *Whistler's Case* (1612), 10 Co. Rep. 63.

SECT. 14. Royal Grants.

Deceit.

750. Grants will, in general, be void for deceit (that is to say, the presumption that the King is deceived in his grant) upon three grounds:—First, where the Crown grants a greater or different estate than it is entitled to; secondly, where the same estate, or part of it, has already been granted to another, and the prior grant is not recited; thirdly, where the Crown has been deceived in the consideration expressed in the grant (*b*). Thus, where property was granted by the Crown for an estate in fee in possession, and it turned out that the same property had already been granted under a lease for years which had several years to run and which was not recited in the grant, the grant in fee was held to be void, it being inconsistent with the King's honour to grant two interests in possession at the same time (*c*). But this principle would, it seems, apply only to cases where the prior grant is of record (*e.g.*, enrolled), and where, therefore, the subject cannot be deceived (*d*); and the second grant will not be void if the prior grant is recited, for then there is no uncertainty and the King is not deceived (*e*); and, generally, when a reversion is granted by the Crown, it is usually necessary that the previous term or estate still *in esse*, and which is of record, should be recited (*f*).

The Crown's title need not, however, be recited (*g*), and if the facts be recited and a wrong conclusion of law or fact drawn therefrom, this will not avoid the grant (*h*). So a recital that the Crown is entitled by escheat, whereas it is really entitled by inheritance, or a misdescription of the grantee, as that he is a knight when he is not (*i*), will not avoid the grant.

Mistake.

But grants will be void where the Crown is prejudiced by a mistake in a material point, either in its tenure or profit (*k*); or where a recital which sounds for the Crown's benefit turns out to be false (*l*); as that the grant is made in consideration of the surrender of a lease, when the lease is in fact void (*m*); or if land be

(*b*) *Gledstanes* v. *Sandwich* (*Earl*) (1842), 4 Man. & G. 995. And see, as to false consideration, 2 Roll. Abr. 189, pl. 15, 25; *Barwick's Case* (1597), 5 Co. Rep. 94 a; 2 Bl. Com., 14th ed., 347; *Penn* v. *Baltimore* (*Lord*) (1750), 1 Ves. Sen. 444, 451. As to the grant of a greater or different estate, see Com. Dig. tit. Grant, G, 8; 2 Bl. Com., 14th ed., 348.

(*c*) *Alcock* v. *Cooke* (1829), 5 Bing. 340, 349; see also *Alton Woods' Case* (1600), 1 Co. Rep. 40; *Rutland's* (*Earl*) *Case* (1608), 8 Co. Rep. 55 a, 57 a; *Wing* v. *Harris* (1591), Cro. Eliz. 231.

(*d*) *Alcock* v. *Cooke*, *supra*, *per* BEST, C.J., at p. 349; *Alton Woods' Case*, *supra*, 40, 45 a.

(*e*) *Rutland's* (*Earl*) *Case*, *supra*, 55, a, 56, b; *Alcock* v. *Cooke*, *supra*, *per* BEST, C.J., at p. 349. As to what constitutes a sufficient recital of a prior grant, see *Bozoun's Case* (1584), 4 Co. Rep. 34 b, 35 b; Vin. Abr. tit. Prerog. R, b.

(*f*) Vin. Abr. tit. Prerog. Q, b; Com. Dig. tit. Grant G, 10.

(*g*) *Alton Woods' Case*, *supra*, 45 b, 51 a; *Englefield's Case* (1590), Moore (K. B.), 303, 318, 320.

(*h*) *Chandos's* (*Duke*) *Case* (1606), 6 Co. Rep. 55 a.

(*i*) *R.* v. *Chester* (*Bishop*) (1697), 1 Ld. Raym. 292, 304.

(*k*) Bac. Abr. tit. Prerog. F, 2.

(*l*) See 2 Roll. Abr. 188; *Cholmley's Case* (1597), 2 Co. Rep. 49 b, 54; *Devonshire's* (*Earl*) *Case* (1606), 11 Co. Rep. 89 a, 90; *Case of an Abbot* (1576), Dyer, 352 a.

(*m*) *Barwick's Case* (1597), 5 Co. Rep. 93 b, 94 a.

granted on a false suggestion that the land is of less value than it really is (*n*); or where the grant is to take effect on the determination of a former grant which is in fact determined (*o*); and in such cases the grant will be void even though derivative titles depend upon it (*p*).

Grants of offices with fees, when void.

751. Where a patent of the receivership of the Court of Augmentation was granted for life of the grantee with a fee, and the court was afterwards dissolved by statute (*q*), the whole patent was void (*r*). But where an office of stewardship of a manor, or a partnership, or the like, is granted, with a fee for exercising the office, the fee remains, it is said, though the King or the lord alienes the manor, disparks the park, or discharges the office; and, generally, where the fee arises from the profits of the office, the King or other grantor cannot by determining the office destroy the grant of the fee (*s*).

SUB-SECT. 3.—*Presumption of Grants.*

Presumed grant.

752. In disputes relating to land or incorporeal hereditaments between subject and subject a grant from the Crown will in some cases be presumed in order to support a possessory title, though the acts of user or enjoyment relied upon would not necessarily be sufficient to displace the title of the Crown itself (*t*). Thus possession over a period of 350 years, though commencing within the time of legal memory, has been held sufficient to support the presumption of a grant from the Crown, though such grant would not have been effectual without matter of record and no such record in fact existed (*u*). And the grant of an advowson, although expressly excepted from a former grant, was presumed good after continued possession for 133 years, as evidenced by title deeds, and three presentations (*x*). Other examples of the same principle are to be found (*y*).

(*n*) 2 Roll. Abr. 188, pl. 15; *Penn* v. *Baltimore* (*Lord*) (1750), 1 Ves. Sen. 444, 451.

(*o*) *Holt and Roper's Case* (1559), 3 Leon. 5, 6; *Curle's* (*Auditor*) *Case* (1609), 11 Co. Rep. 2 b, 4 b.; 2 Roll. Abr. 188.

(*p*) *Cumming* v. *Forrester* (1820), 2 Jac. & W. 334.

(*q*) Stat. 1 Mar. sess. 2, c. 10.

(*r*) *Anon.* (1561), Jenk. 225, because the grantee concurs in the Act of Parliament (*ibid.*).

(*s*) *Ibid.*

(*t*) *Wyse* v. *Leahy* (1875), I. R. 9 C. L. 384. As to possession of the foreshore, see *Hastings Corporation* v. *Ivall* (1874), L. R. 19 Eq. 558. See also *Goodtitle* d. *Parker* v. *Baldwin* (1809), 11 East, 488. See also *Wheaton* v. *Maple*, [1893] 3 Ch. 48, C. A., *per* KEKEWICH, J., at pp. 51, 56, that in a proper case a lost grant may be presumed against the Crown, as established by *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633.

(*u*) *Kingston-upon-Hull Corporation* v. *Horner* (1774), 1 Cowp. 102.

(*x*) *Gibson* v. *Clark* (1819), 1 Jac. & W. 159.

(*y*) As to the presumption of a supplementary and confirmatory grant of undefined shares in land, see *Des Barres* v. *Shey* (1873), 22 W. R. 273. As to user by exercise of sporting rights etc., see *Harper* v. *Charlesworth* (1825), 6 Dow. & Ry. (K. B.) 572. As to what constitutes sufficient user of the foreshore, see *Le Strange* v. *Rowe* (1866), 4 F. & F. 1048. As to evidence of user and presumption of grants in the case of several fisheries in tidal waters, see *Chesterfield* (*Lord*) v. *Harris*, [1908] 1 Ch. 230; *Tighe* v. *Sinnott*, [1897] 1 I. R. 140;

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No presumption against statutory restraint.

But where the Crown is expressly restrained by statute from making the grant, no such grant can be presumed even after continued acts of ownership and enjoyment (*a*). Thus, where the Crown was restrained by statute (*b*) from making future grants in the Forest of Dean, no valid grant could be presumed, and therefore continued possession for fifty-five years was not sufficient to support a title as against a subsequent adverse possession (*c*). And no grant of a several fishery in tidal rivers and arms of the sea subsequent to Magna Carta can be presumed, the Crown having been restrained by that statute from making fresh grants affecting public rights (*d*).

Adverse possession and prescription.

753. In suits relating to land (except liberties and franchises) sixty years' possession by a subject affords, in general, a valid statutory title as against the Crown (*e*), and in such cases a grant will be presumed. Where no statutory protection is afforded as against the Crown, user or enjoyment extending over a definite period must in some cases be alleged, otherwise a valid grant cannot be presumed (*f*). In the case of franchises or liberties twenty years' uninterrupted enjoyment affords valid evidence of title upon which a grant may be presumed at common law (*g*). But in this and in all other cases of prescriptive title as against the Crown not provided for by statute (*h*), though immemorial enjoyment need not necessarily,

Smith v. *Andrews*, [1891] 2 Ch. 678 ; *Little* v. *Wingfield* (1859), 11 I. C. L. R. 63, Ex. Ch. ; *O'Neill* v. *Allen* (1859), 9 I. C. L. R. 132. As to the presumption of a grant of the soil in the case of a several fishery, see *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401, and title FISHERIES.

(*a*) *Goodtitle* d. *Parker* v. *Baldwin* (1809), 11 East, 488.

(*b*) Stat. 20 Car. 2, c. 3.

(*c*) *Goodtitle* d. *Parker* v. *Baldwin*, *supra*.

(*d*) The grant of exclusive fisheries was expressly forbidden for the future by Magna Carta ; but where the public were excluded prior to Magna Carta, a subsequent grant of that fishery by the Crown would be valid (*ibid.*). See title FISHERIES.

(*e*) Under the Nullum Tempus Act, 1769 (9 Geo. 3, c. 16), s. 1, as amended by the Crown Suits Act, 1861 (24 & 25 Vict. c. 62), s. 1, the Crown is barred in suits for the recovery of land (except liberties and franchises) after 60 years. See also title LIMITATION OF ACTIONS. As to the application of this principle to foreshore, see *A.-G.* v. *Portsmouth Corporation* (1877), 25 W. R. 559.

(*f*) In cases where the Crown has been prohibited by statute from making grants, *e.g.*, Magna Carta, by which the Crown is restrained from making grants in derogation of public rights. As to free fisheries in tidal or navigable waters, see the text, *supra*.

(*g*) See the references in next note.

(*h*) As to how far the Crown is bound by the Prescription Acts as to light and other easements, see note (*a*), p. 410, *ante*. The Crown is not bound by the general statutes of limitations (see title STATUTES). As to presumption of various grants, see *Merttens* v. *Hill*, [1901] 1 Ch. 842 (manor) ; *Kingston-upon-Hull Corporation* v. *Horner* (1774), 1 Cowp. 102 ; *Foreman* v. *Whitstable* (*Free Fishers and Dredgers*) (1869), L. R. 4 H. L. 266 (tolls on shipping) ; *Turner* v. *Walsh* (1881), 6 App. Cas. 636, P. C. (highway, user for 21 years) ; *Campbell* v. *Wilson* (1803), 3 East, 294 (right of way) ; *Gibson* v. *Clark* (1819) 1 Jac. & W. 159 (advowson) ; *Roe* d. *Johnson* v. *Ireland* (1809), 11 East, 280 (enfranchisement of copyhold) ; *Simpson* v. *Gutteridge* (1816), 1 Madd. 609 (extinction of fee farm rents). See, generally, *Read* v. *Brookman* (1789), 3 Term Rep. 151 ; *Pickering* (*Lord*) v. *Stamford* (*Lord*) (1793), 2 Ves. 272 (bill for an account of personal estate under a bequest in 1754 claimed to be void under the Statute of Mortmain) ; *Wheaton*

it seems, be alleged (*i*), it is apprehended that no grant would be presumed if acts of ownership by the Crown within the period of legal memory were proved (*k*).

Prescription for rights of common, *profits à prendre*, ways, and watercourses over Crown lands.

754. Rights of common, or other profits or benefits to be taken or enjoyed from or upon any land of the Sovereign, or any land being parcel of the Duchies of Lancaster or Cornwall respectively, and any ways or other easements, or the right to any watercourse, or the use of any water to be enjoyed or derived upon, over, or from any land or water of the Sovereign, or being parcel of the said duchies respectively, may be prescribed for under the provisions of the Prescription Act, 1832, relating thereto (*l*); but the right to light cannot be so prescribed for (*m*).

SUB-SECT. 4.—*What the Crown may or may not grant.*

Prerogatives may not be granted.

755. Apart from the franchises presently to be mentioned (*n*) which are granted out of the prerogative, the general rule at common law is that the King may not grant to another the prerogatives of the Crown (*o*). Thus, it is said, the King cannot grant the right of distributing justice so as to exclude himself (*p*). Nor may he grant his prerogatives in connection with public government (*q*), such as the right of summoning Parliament (*r*),

v. *Maple*, [1893] 3 Ch. 48, C. A.; *Brune* v. *Thompson* (1843), 4 Q. B. 543 (jury directed not to presume grant—which should be of record, and not produced—on evidence of usage).

(*i*) *E.g.*, a claim to a port or harbour (see *Jenkins* v. *Harvey* (1835), 1 Gale, 23, *per* PARKE, B., at p. 27). For a claim to fix moorings on the foreshore by immemorial user, see *A.-G.* v. *Wright*, [1897] 2 Q. B. 318, C. A.

(*k*) Since, in the absence of statutory provisions, no time runs against the Crown, and no *laches* is attributable to it (see p. 410, *ante*). The time of legal memory has long been fixed to commence from the beginning of the reign of Richard I. (see 2 Co. Inst. 238, 239; 2 Bl. Com., 14th ed., 31).

(*l*) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 1, 2. See, generally, as to the interpretation of the statute, titles EASEMENTS AND PROFITS À PRENDRE; REAL PROPERTY AND CHATTELS REAL; WATERS AND WATERCOURSES.

(*m*) *Perry* v. *Eames*, [1891] 1 Ch. 658; approved, *Wheaton* v. *Maple*, *supra*. The Crown, not being named by s. 3 of the Act, is not bound thereby, and the general words "other easements" in s. 2 of the Act do not apply to an easement of light, which is governed exclusively by s. 3. *Quære* whether the words "other easements" would be sufficient to embrace other easements not expressly mentioned and not exclusively governed by the Act (see as to when the Crown is bound by statute, p. 409, *ante*, and title STATUTES).

(*n*) See p. 489, *post*. As to the power of granting such franchises at the present day, see note (*m*), p. 490, *post*.

(*o*) Vin. Abr. tit. Prerog. M, b, pl. 20; Bro. Abr. tit. Prerog. pl. 60.

(*p*) *Ibid.* Although in early times the King did in fact erect counties palatine and transferred to their rulers full *jura regalia* to the exclusion of his own wries until such rights with regard to the issue of writs and process were restored to the Crown by statute in 1535 (27 Hen. 8, c. 24, s. 3), it is apprehended that such instances must be looked upon as exceptions to the general rule or, perhaps, as acts done before the rule was finally established, rather than precedents to the contrary, and that palatinate jurisdictions cannot be granted at the present day without the authority of an Act of Parliament (see 4 Co. Inst. 204; Bac. Abr. tit. Courts Palatinate).

(*q*) Vin. Abr. tit. Prerog. M, b, pl. 34.

(*r*) 1 Bl. Com., 4th ed., 119.

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or of assenting to bills (*s*), or the power of making judges and sheriffs (*t*); although such powers may be, and invariably are, delegated to the governors of colonies to avoid the inconvenience and delay which would otherwise arise from distance and the absence of the King (*u*), and the privilege of choosing its own sheriff was sometimes granted to a county corporate (*x*). So also the King cannot grant away the right to the Crown by testament (*a*), or the right to dig for saltpetre (*b*).

Personal prerogatives.

756. Nor may the Sovereign grant away such personal prerogatives as the lapse of a church, for that is a trust reposed in himself (*c*), or the right to make denizens (*d*), or of pardoning offences (*e*); or the jewels of the Crown (*f*), which are heirlooms and as such do not pass to the executor (*g*).

Prerogative of justice.

757. Nor can the Sovereign, in general, grant anything which is prejudicial to the administration of justice. Thus, he cannot exclude his own right of criminal prosecution (*h*); or grant commissions to execute any other law than the common law (*i*); or exempt from future liability to punishment for offences (*k*); and grants and promises of fines and forfeitures of particular persons, before conviction, are illegal (*l*). So also the King cannot, in general, by his grant derogate from public or private rights of the subject, which are protected by Magna Carta (*m*); and grants in derogation of rights vested in another by a previous grant are void (*n*).

Derogatory grants.

758. The King is also restrained from making grants in derogation of the common or statute law. Thus, he cannot suspend or

(*s*) Chitty, Prerogatives of the Crown, p. 74. But see as to affixing the royal assent by commission, title PARLIAMENT; and by governors of colonies, title DEPENDENCIES AND COLONIES.

(*t*) Vin. Abr. tit. Prerog. M, b, pl. 21.

(*u*) See *ibid.* As to the powers usually delegated to colonial governors, see title DEPENDENCIES AND COLONIES.

(*x*) See p. 492, *post*; and title SHERIFFS AND BAILIFFS.

(*a*) Vin. Abr. tit. Prerog. M, b, pl. 21.

(*b*) *Case of Saltpetre* (1606), 12 Co. Rep. 12.

(*c*) Vin. Abr. tit. Prerog. M, b, pl. 7.

(*d*) Bac. Abr. tit. Prerog. F, 1; Bro. Abr. tit. Patents, pl. 111.

(*e*) 27 Hen. 8, c. 24, s. 1; Bac. Abr. tit. Prerog. F, 1. This right may, it seems, be delegated in cases of necessity arising from distance or in the King's absence, and is usually delegated to colonial governors.

(*f*) Vin. Abr. tit. Prerog. M, b, pl. 21. But see *contra Hastings* (*Lord*) v. *Douglas* (1633), Cro. Car. 344, where it is said they may be granted by letters patent during the King's life, but not by testament.

(*g*) Co. Litt. 18 b; *Devonshire's* (*Earl*) *Case* (1606), 11 Co. Rep. 92.

(*h*) Vin. Abr. tit. Prerog. M, b, pl. 34.

(*i*) *Ibid.*, pl. 3; Bac. Abr. tit. Prerog. F, 1; 2 Co. Inst. 54.

(*k*) 2 Roll. Abr. 192; Vin. Abr. tit. Prerog. Y, b, pl. 1.

(*l*) Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2). As to fines and forfeitures generally, see p. 489, *post*. As to grants since the surrender of the hereditary revenues, see Vol. VII., Part VII.

(*m*) Magna Carta, c. 29. As to grants derogatory of public rights of fishing, see note (*d*), p. 484, *ante*.

(*n*) *Alcock* v. *Cooke* (1829), 5 Bing. 340; *R.* v. *Amery* (1788), 2 Term Rep. 515, 509; *Alton Woods' Case* (1600), 1 Co. Rep. 26; *Gledstanes* v. *Sandwich* (*Earl*) (1842), 4 Man. & G. 995; Vin. Abr. tit. Prerog. F, 1.

dispense with laws or the execution of laws (*o*); or grant a right to hold a court of equity (*p*); or create a mode of descent unknown to the common law (*q*).

Exceptions.

759. But in some instances grants by the Crown are valid which would have been invalid at common law if made by a subject. Thus, a grant by the Crown to the inhabitants of a parish may be good, even though it would not have been effectual at common law if made by a subject (*r*); and a grant in fee by the Crown may contain a condition against alienation (*s*). A grant by the Crown of unascertained shares in land was held not to be void for uncertainty after continued possession, a confirmatory grant being presumed in such a case (*a*).

Taxes.

760. The Crown cannot by grant impose new taxes or enlarge old ones (*b*). In certain cases, however, where the grant is for the public utility and there is a *quid pro quo* to the public, a grant of the right to take a toll is valid (*c*). Thus, grants of pontage and murage are valid (*d*); markets, fairs, ferries, and harbours may be granted with the right to take tolls or dues (*e*); and tolls on the highway may be claimed by grant or prescription, though they may not, it is said, be granted at the present day (*f*).

Tolls.

All such tolls and dues must, in general, have a reasonable commencement, and be fair and moderate in their amount; otherwise the franchise will be void (*g*).

(*o*) Bill of Rights, 1688 (1 Will. & Mar., sess. 2, c. 2), s. 1.

(*p*) See p. 402, *ante*.

(*q*) Vin. Abr. tit. Prerog. M, b, pl. 23; 2 Roll. Abr. 164. As to the limitation of a title in a manner unknown to the common law, see *Cope* v. *De la Warr* (*Earl*) (1873), 8 Ch. App. 982; *Wiltes Peerage Claim* (1869), L. R. 4 H. L. 126; and see p. 456, and title DIGNITIES.

(*r*) *Willingale* v. *Maitland* (1866), L. R. 3 Eq. 103, 109 (grant of a *profit à prendre* to the inhabitants of a parish held good as a grant to the parish *quâ* corporation. The grant in this case being the right to take lopwood was in derogation of the Crown's forestal rights, otherwise, it seems, it might have been bad). See also *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735, 741—743.

(*s*) *Fowler* v. *Fowler* (1866), 16 I. Ch. R. 507.

(*a*) *Des Barres* v. *Shey* (1873), 29 L. T. 592, P. C.

(*b*) 2 Co. Inst. 58, 60, 62, 63; Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2).

(*c*) Vin. Abr. tit. Prerog. M, b, pl. 18. That consideration to the public is essential in the case of markets and fairs is shown by the writ of *ad quod damnum* which is issued by the Crown before the grant of a market or fair (see Bac. Abr. tit. Fairs, A, and title MARKETS AND FAIRS).

(*d*) See p. 491, *post*.

(*e*) As to tolls in markets and fairs, see title MARKETS AND FAIRS; as to ferries, see title FERRIES; as to harbour dues, see p. 458, *ante*, and title SHIPPING AND NAVIGATION.

(*f*) Bac. Abr. tit. Prerog. F, 1. Toll-thorough can, it seems, only be claimed where consideration is shown by keeping the highway in repair, or the like, whereas toll-traverse may be claimed without showing consideration, though such is presumed by the law (see *Pelham* (*Lord*) v. *Pickersgill* (1787), 1 Term Rep. 660, *per* ASHHURST, J., at p. 667; *Hill* v. *Smith* (1812), 4 Taunt. 520, Ex. Ch.; and see title HIGHWAYS).

(*g*) 2 Bl. Com., 14th ed., 37; *Heddy* v. *Wheelhouse* (1597), Cro. Eliz. 558, *per* POPHAM, J., at p. 559. See also the authorities cited in note (*f*), *supra*.

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Exemption from taxes or tolls.

761. The King may not grant exemptions from taxes or charges imposed by Act of Parliament (*h*). He may, however, grant exemptions from tolls in markets due to himself, or in respect of markets subsequently to be granted, but not in respect of tolls due in an old fair or market belonging to a subject (*i*); and similar principles would, it seems, be applicable in the case of other tolls (*k*).

The Crown may also grant exemptions from serving in certain public offices, such as sheriff or the like (*l*).

Reversionary interests.

762. The Crown may, in general, grant reversionary interests. Thus, it may grant a reversionary interest in land, or an office may be granted in reversion if it be such that the King cannot exercise it himself (*m*); but a corody or a right of presentment cannot, it is said, be given in reversion, since the Crown has the right only when the corody or church becomes void (*n*).

Monopolies.

763. Grants of monopolies by the Crown are bad at common law (*o*), except in the case of patents for new inventions (*p*). Grants of patents for inventions, together with the registration of copyrights and designs, are regulated by statute (*q*); and, when granted, a patent for an invention has to all intents the like effect as against the Crown as against a subject, subject to certain conditions enabling Government departments to make use of the invention upon terms agreed upon, with the approval of the Treasury, either before or after use of the invention; or, in default of agreement, upon terms to be settled by the Treasury after hearing all parties interested (*a*).

Freedom of trade.

764. All British subjects have equal rights of trading within the dominions and dependencies of the Crown, unless prohibited by Act of Parliament. The Crown may not, therefore, by charter or otherwise, grant exclusive trading licences to any person or corporation (*b*).

(*h*) See Vin. Abr. tit. Prerog. K, c; 2 Roll. tit. Abr. 199; Bill of Rights, 1688 (1 Will. & Mar. sess. 2, c. 2).

(*i*) Com. Dig. tit. Prerog. D, 33; 2 Co. Inst. 221; Bac. Abr. tit. Fairs, D, 2.

(*k*) See Vin. Abr. tit. Prerog. K, c; 2 Roll. Abr. 198; Com. Dig. tit. Prerog. D, 33.

(*l*) As to exemption from service in public offices generally, see p. 387, *ante*.

(*m*) See *Rutland's (Earl) Case* (1608), 8 Co. Rep. 55 a, 55 b.

(*n*) *Ibid.* See title ECCLESIASTICAL LAW.

(*o*) *Case of Monopolies* (1602), 11 Co. Rep. 84 b, grant for the exclusive making and importing of playing cards held to be a monopoly, and therefore void.

(*p*) *Ibid.* This right of the Crown was recognised by the judges.

(*q*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29).

(*a*) *Ibid.*, s. 29. As to the assignment of inventions to the Secretary of State for War and the Admiralty in certain cases, see *ibid.*, s. 30. As to patents, designs, and copyrights generally, see titles COPYRIGHT AND LITERARY PROPERTY; PATENTS AND INVENTIONS.

(*b*) Commons' Journal, 19th January, 1694. The Statute of Monopolies, 1624 (21 Jac. 1, c. 3), s. 9, expressly excepted the rights of corporations, and of any companies or societies of merchants, from the operation of the Act, and it was held in the case of *East India Co.* v. *Sandys* (1684), 10 State Tr. 371 (known as "the Great Case of Monopolies"), that a grant to the East India Company of the sole right of trading to the East Indies was good. On a petition of the merchants for creating a new East India Company in 1694, the House of Commons resolved "that all subjects of England have equal right to trade to the East

Licences may be granted to alien enemies to trade in time of war (*c*).

Fines and forfeitures.

765. The Crown, being entitled to all fines and forfeitures by virtue of the prerogative, could formerly grant away the right in the form of franchises; and under such grants many lords of manors have the right to fines for offences within their manors (*d*). But where not granted in the form of franchises, the revenues from fines and forfeitures are now, as a rule, paid into the Consolidated Fund to form part of the national revenues (*e*).

Anticipatory grants.

766. The Crown is restrained from granting lands seized before office found and returned (*f*); nor may it grant land "when it shall escheat" (*g*).

But the Crown may, in general, grant a mere possibility or an interest depending on a contingency (*h*).

Annuities.

767. As the Sovereign cannot be made personally liable, a Crown grant of an annuity will be void at common law unless charged upon possessions of the Crown (*i*).

SUB-SECT. 5.—*Grants of Franchises.*

Franchises.

768. Certain franchises, whilst they remain in the hands of the Crown, form part of the royal prerogative, and do not exist

Indies unless prohibited by Act of Parliament" (Commons' Journal, *supra*; see also 5 Parl. Hist. 828). Trade in India was not, however, thrown open to the public until 1813 (see East India Company Act, 1813 (53 Geo. 3, c. 155), ss. 2, 3); and see title TRADE AND TRADE UNIONS.

(*c*) As to licences to trade in time of war, see title ALIENS, Vol. I., p. 311.

(*d*) *Groenvelt's Case* (1697), 1 Ld. Raym. 213, 214. As to the power of the Treasury to direct payment of fines, penalties etc. to the persons entitled, see the Fines Act, 1833 (3 & 4 Will. 4, c. 99), ss. 34—36. As to the setting over of fines, penalties, forfeitures etc. to corporations, lords of liberties, and others entitled thereto by such person as the Treasury (formerly the King's Remembrancer) may direct, see the Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 39.

(*e*) See titles CRIMINAL LAW AND PROCEDURE; REVENUE. Certain deductions (including fines and stoppages) from the pay of constables in the police force, certain fines imposed by courts of summary jurisdiction, and certain fines and fees made payable to constables by Act of Parliament, are made payable to the police pension fund by the Police Act, 1890 (53 & 54 Vict. c. 45), s. 16. See also title POLICE. Fines awarded by a court of summary jurisdiction not exceeding 5*s.* may be ordered by the court to be paid to the informant in or towards the payment of costs (Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 8). As to the management of moneys arising from forfeitures or other property and paid to the Treasury solicitor by virtue of the prerogative, see the Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 4. As to the application of fines etc. in the Metropolis, see title METROPOLIS.

(*f*) 8 Hen. 6, c. 16; 18 Hen 6, c. 6; and see *Doe* d. *Hayne* v. *Redfern* (1810), 12 East, 96, 105, 111, 114; *Anon.* (1556), Dyer, 145, 146. A grant of land as forfeited before inquisition found is void (*Leighton's Case* (1690), 2 Vern. 173).

(*g*) *A.-G.* v. *Farmer* (1676), T. Raym. 241.

(*h*) Vin. Abr. tit. Prerog. C, 2; Bac. Abr. Prerog. F, 3.

(*i*) *Anon.* (1695), 1 Salk. 58.

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as franchises until they have been granted out as such to the subject (*k*). Such are royal mines, waifs, wrecks, estrays, treasure trove, fines and forfeitures, royal fish and swans (*l*). These may be validly granted as franchises, notwithstanding the general rule which prevents the Crown from parting with its prerogatives (*m*). But under a general grant of "franchises" such rights, being part of the *jura regalia*, or "flowers of the Crown," will not pass, since they have no existence as franchises until they have been expressly granted (*n*).

Other franchises, again, may be granted not out of but by virtue of the prerogative; but until so granted they have no legal existence (*o*). Instances are markets and fairs (*p*), ferries (*q*), free fisheries (*r*), free chases, parks and warrens, pontage and murage, corporations, counties palatine, counties corporate, and the cinque ports (*s*). Such franchises may become vested in the Crown after their creation by grant from a subject, forfeiture, escheat, intestacy, or other means, and would then probably pass under a grant of franchises generally.

All franchises may be claimed either by grant, or by long and immemorial usage and prescription, which presupposes a former grant; and in the latter case twenty years' uninterrupted enjoyment is, in general, presumptive evidence in favour of a claimant (*t*).

Forest or chase.

769. A forest or chase in the hands of a subject is the liberty granted to a subject of keeping royal game or beasts of chase (*a*),

(*k*) *Groenvelt's Case* (1697), 1 Ld. Raym. 213, 214; Vin. Abr. tit. Prerog. M, b, pl. 20; *A.-G.* v. *British Museum* (*Trustees*), [1903] 2 Ch. 598, 612.

(*l*) As to these prerogatives in detail, see Vol. VII., Part VII., sect. 3.

(*m*) As to the general rule, see p. 485, *ante*. By the Civil List Act, 1901 (1 Edw. 7, c. 4), the hereditary revenues are surrendered to the nation, but the rights and powers exercisable with regard thereto are preserved (*ibid.*, s. 9 (2)). The above franchises might therefore still be granted, it seems, for valuable consideration.

(*n*) *A.-G.* v. *British Museum* (*Trustees*), *supra*.

(*o*) See Bac. Abr. tit. Prerog. F.

(*p*) Markets and fairs, with the tolls belonging, can only be set up by grant or prescription (2 Co. Inst. 220; 1 Bl. Com., 14th ed., 273; *Merchant Adventurers* v. *Rebow* (1687), 3 Mod. Rep. 126, 127; Bac. Abr. tit. Fairs, A, 1). As to markets and fairs generally, see title MARKETS AND FAIRS.

(*q*) As to the Crown's right to grant a ferry with toll, see Bac. Abr. tit. Prerog. F, 1; 2 Roll. Abr. 171; Com. Dig. tit. Prerog. D, 48; Vin. Abr. tit. Prerog. M, b. As to ferries generally, see title FERRIES.

(*r*) As to grants of fisheries in tidal waters and navigable rivers, see title FISHERIES.

(*s*) As to these, see pp. 491, 492, *post*.

(*t*) *Bealey* v. *Shaw* (1805), 6 East, 208, 215; *Weld* v. *Hornby* (1806), 7 East, 195, 199; *Goodtitle* d. *Parker* v. *Baldwin* (1809), 11 East, 488, 491; but as to prescriptive rights of fishing in tidal waters, see note (*y*), p. 483, *ante*.

(*a*) These are properly buck, doe, fox, marten, and roe, but extend in a legal sense to all beasts of the forest or venary, including hart, hind, hare, boar, and wolf (2 Bl. Com., 14th ed., 38, note (x)). Beasts and fowls of warren (see note (*d*), p. 491, *post*) are included by Manwood (Forest Laws, 4th ed.) in the privilege of forest or chase (*ibid.*, p. 38, note (y); see also *Devonshire* (*Duke*) v. *Lodge* (1827), 7 B. & C. 36, 37. As to the right of forest or chase on the soil of another, see *Robinson* v. *Dhuleep Singh* (1879), 11 Ch. D. 798, C. A. According to Manwood (Forest Laws, 4th ed.), a forest differs from a chase in

within his own or another's land, which need not be inclosed with a fence, with the right of hunting them thereon, protected from other persons, including (in the latter case) the owner of the soil (*b*).

Parks.

770. A legal park differs from a chase in being confined to land of the grantee, which must also be inclosed with a wall or paling (*c*).

Free warren.

771. Free warren was originally granted for the preservation of fowls and beasts of warren, and gave the grantee the exclusive right to kill fowls and beasts of warren (*d*), as well as a property in such animals (*e*), within the limits of the warren, which may be claimed in the land of another to the exclusion of the owner (*f*).

These franchises of chase, park, and warren have now lost much of their former importance, since their ownership is no longer necessary to enable a person legally to kill beasts of chase or park or fowls and beasts of warren (*g*). An excise licence is, however, required under the Game Acts before a person may legally kill animals to which the Acts apply (*h*).

Pontage and murage.

772. Pontage and murage are the rights granted to persons who erected new bridges, or walls for purposes of defence or the like, to take a toll for the keeping and repairing of the bridge or wall respectively, and may be claimed by prescription (*i*), but only so long, it is said, as the bridge or wall remains useful (*k*).

Corporations.

773. At common law the Crown enjoys the exclusive right of creating corporations by charter (*l*), except such corporations as

being granted subject to the forest laws (*R.* v. *Briggs* (1615), 2 Bulst. 295), and prior to the Carta de Foresta (25 Edw. 1, 9 Hen. 3, Ruff.), the Crown could afforest lands of the subject wherever it pleased (2 Bl. Com., 14th ed., 38, note 17).

(*b*) 2 Bl. Com., 14th ed., p. 38.

(*c*) *Ibid.*, p. 38; *Leicester Forest Case* (1607), Cro. Jac. 155; Select Pleas of the Forest (Seld. Soc.), cxv., cxvi., cxxii.

(*d*) Fowls and beasts of warren included hares, conies, roes, partridges, rails, quails, woodcocks, pheasants, mallards, and herons (2 Bl. Com., 14th ed., 38, note (b); but see Manwood, Forest Laws, 4th ed., p. 362; *Devonshire* (*Duke*) v. *Lodge* (1827), 7 B. & C. 36, 37, 38). Grouse are not fowls of warren (*Devonshire* (*Duke*) v. *Lodge*, *supra*), but an action of trover lies if they are shot on another's land (*Rigg* v. *Lonsdale* (*Earl*) (1857) 1 H. & N. 923, Ex. Ch.). Whether wild duck are fowls of warren appears to be doubtful (see *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139, 163, 164); and see title GAME.

(*e*) *Devonshire* (*Duke*) v. *Lodge*, *supra*, *per* Lord TENTERDEN, C.J., at p. 39.

(*f*) *Ibid.* The right is an incorporeal hereditament, and passes only by deed of grant (*Beauchamp* (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223).

(*g*) 2 Bl. Com., 14th ed., p. 39. According to Blackstone, by the early common law sporting even upon a man's own land was forbidden unless the owner of the land had the right of chase or warren. But this has been doubted (*ibid.*, p. 39, note 20, p. 419, note 10). Under the early forest laws such sporting was so prohibited (see Steph. Hist. Crim. Law, ed. 1883, Vol. III., 275, 276).

(*h*) As to game licences generally, see title GAME.

(*i*) Bac. Abr. tit. Prerog. F, 1; Com. Dig. tit. Prerog. D, 48; 2 Roll. Abr. 171.

(*k*) Bac. Abr. tit. Prerog. F, 1; Vin. Abr. tit. Prerog. M, b, pl. 19.

(*l*) Bro. Abr. tit. Corporation, 15; 1 Bl. Com., 14th ed., 472; *Sutton's Hospital*

SECT. 14. Royal Grants.

exist by custom and with the implied consent of the Crown, examples of the latter being the King, and ecclesiastical persons such as bishops, parsons, vicars, and churchwardens, who are at common law corporations *virtute officii* (*m*). A corporation may exist by prescriptive right, which presupposes a former grant, as in the case of the City of London (*n*), and the Crown may grant the right to create a corporation, for *Qui facit per alium facit per se* (*o*).

Municipal franchises.

774. At common law the Crown may grant to a town the right or franchise of choosing its own sheriff (*p*), or of having its own justices to the exclusion of the county justices (*q*).

So also the Crown frequently exercised the right of granting to a city or town the franchise of being a "county corporate," or county in itself, apart from the general body of the county, with its own sheriffs and officers exclusive of the county officers (*r*). The constitutions of such bodies corporate were remodelled by statute in 1835 (*s*), and are now regulated principally by the Municipal Corporations Act, 1882 (*t*), which applies also to any town, district, or place whereof the inhabitants are incorporated after the commencement of the Act, and whereto the provisions of the Acts are extended by charter under the Act, but to no other place (*a*).

Various franchises.

775. Other franchises are counties palatine (*b*) (the rights with regard to which have now for the most part become revested in the Crown (*c*)), the cinque ports (*d*), manors or lordships (*e*), and courts leet (*f*).

Case (1612), 10 Co. Rep. 33 b. As to the prerogative powers of the Crown with regard to the creation of corporations in 1720, see *Elve* v. *Boyton*, [1891] 1 Ch. 501, C. A., *per* LINDLEY, L.J., at p. 507. The Crown could, it seems, incorporate any number of persons with power to sue and be sued under their corporate name, to use a common seal, and to make bye-laws etc., but not to enjoy monopolies or contract liability for the debts of the corporation; see title CORPORATIONS. As to companies, which are statutory corporations incorporated under the Companies Acts, see title COMPANIES, Vol. V.

(*m*) 1 Bl. Com., 14th ed., 471, 472.

(*n*) *Ibid.*, 472; 2 Co. Inst. 330.

(*o*) 1 Bl. Com., 14th ed., 474.

(*p*) Vin. Abr., tit. Prerog. M, b, 18, 21; see title SHERIFFS AND BAILIFFS.

(*q*) See *Blankley* v. *Winstanley* (1789), 3 Term Rep. 279. Such jurisdiction is, however, concurrent with the county jurisdiction unless the contrary appears (*R.* v. *Sainsbury* (1791), 4 Term Rep. 451); see title MAGISTRATES.

(*r*) 1 Bl. Com., 4th ed., 92; see title LOCAL GOVERNMENT.

(*s*) 5 & 6 Will. 4, c. 76. The corporations to which this Act applies are set out in Scheds. A and B to the Act (*ibid.*, s. 1).

(*t*) 45 & 46 Vict. c. 50.

(*a*) *Ibid.*, s. 6. For the law as to municipal corporations generally, see title LOCAL GOVERNMENT.

(*b*) Derived from *palatinum*, because the grantee enjoyed *jura regalia* as fully as the King in his palace (1 Bl. Com., 14th ed., 116).

(*c*) As to the revesting of palatine jurisdictions in the Crown, see note (*h*), p. 400, *ante*; as to the Crown's prerogatives relating to property in Lancaster and Durham, see Vol. VII.

(*d*) See titles COURTS; SHIPPING AND NAVIGATION.

(*e*) See title REAL PROPERTY AND CHATTELS REAL.

(*f*) See title COURTS.

SUB-SECT. 6.—*Stamp Duty on Grants.*

SECT. 14. Royal Grants.

Stamp duty on grants.

776. A grant by letters patent under the Great Seal, or the Wafer Great Seal of the United Kingdom, or the Great Seal of Ireland, or the seal of the Duchy or County Palatine of Lancaster, or the seal kept and used in Scotland in place of the Great Seal formerly used there, of any franchise, liberty, or privilege to any person or body politic or corporate is subject to a duty of £30, payable by means of an impressed stamp (*g*).

The exemplification or *constat* under the Great Seal of the United Kingdom of any letters patent or grant made or to be made by His Majesty or by any of his royal predecessors of any honour, dignity, promotion, franchise, liberty or privilege, or of any lands, office or other thing whatsoever, is subject to an impressed stamp duty of £5 (*h*).

Warrants under His Majesty's sign manual are subject to an impressed stamp duty of 10*s*. (*i*).

SECT. 15.—*General Rights of the Crown in Relation to Property.*

Priority of Crown rights.

777. Where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being "*detur digniori*" (*k*).

Thus, the Crown cannot have a joint property with any person in one entire chattel, or such a one as is not capable of division, and where the title of the Crown and a subject concur, the Crown takes the whole (*l*). So if a horse or a debt be assigned to the Crown and a subject, or where two persons have a joint property in a horse or debt and one person assigns his share to the Crown, or where a bond is made to the Crown and a subject, the Crown takes the whole (*m*), for it cannot be a partner with a subject (*n*). Nor can the Crown become a joint owner of a chattel real by grant or contract, but takes the whole (*o*). But where a share of real property becomes vested in the King by descent, or, it seems, otherwise, though he cannot be joint tenant, he takes only his share (*p*); and the King and a subject may be tenants in common (*q*). So

(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 2, Sched. I.
(*h*) *Ibid.*
(*i*) *Ibid.*
(*k*) Co. Litt. 30 b; *Quick's Case* (1611), 9 Co. Rep. 129 a, 129 b; *Sadlers' (Warden and Commonalty) Case* (1588), 4 Co. Rep. 54 b, 55 a; *A.-G.* v. *Andrew* (1655), Hard. 23; Bac. Abr. Prerog. E, 4.
(*l*) Co. Litt. 30; 2 Bl. Com., 14th ed., 409; *Willion* v. *Berkley* (1561), 1 Plowd. 223, 243.
(*m*) *Ibid.* See also *Case of Mines* (1568), 1 Plowd. 310, 323, Ex. Ch.; *Miles* v. *Willing* (1713), 10 Mod. Rep. 245, forfeiture on outlawry; *R.* v. *Fairclough* (1597), Cro. Eliz. 265. *Quære* whether the principle applies in the case of a gift by a subject (*ibid.*).
(*n*) 2 Bl. Com., 14th ed., 409.
(*o*) *Ibid.*
(*p*) Co. Litt. 180 b, 186 a, 190 a; Bac. Abr. tit. Joint Tenants, B; 2 Bl. Com., 14th ed., 184; *Willion* v. *Berkley*, *supra*, at p. 247; Chitty, Prerogatives of the Crown, pp. 210, 248. Under a gift to the King and a subject and their heirs, the King and subject take as tenants in common and not as joint tenants (*ibid.*).
(*q*) Bro. Abr. tit. Prerog. 105.

SECT. 15. General Rights of the Crown in Relation to Property.

also on an extent against one of several partners, the Crown takes the interest of such one alone, and that subject to the partnership debts (*r*).

Personal property.

778. Personal property of the Crown is not subject to the law relating to wreck, estrays, or waifs (*s*), or to sale in market overt (*t*), or distress for rent or damage feasant (*a*); and no custom which goes to the person or goods binds the Crown (*b*) (except in certain cases relating to land (*c*)), and it is, therefore, exempt from all customary rates and tolls (*d*).

Demesne lands.

779. Demesne lands of the Crown (*e*) are not, it is said, discharged from tithe by prerogative right (*f*), though they may be discharged by prescription *de non decimando*, which is a personal right attaching to the King as *persona mixta*, as also to the clergy (*g*), and does not pass to the King's grantee (*h*). Upon alienation, therefore, the prescription is destroyed and the land becomes subject to tithe (*i*). Forest lands, whilst in the hands of the Crown, are not titheable, but they become so if disafforested, and within a parish (*k*).

Copyholds.

780. At common law the Sovereign cannot, it seems, be a copyholder, for it is beneath his dignity to perform the services; and where a copyhold tenant becomes King, the copyhold is suspended, but revives to the person, not being king, who takes on the King's decease (*l*). Copyholds belonging to the King in his natural capacity as private estates may now be held by trustees on his behalf under statutory authority (*m*).

Trusts.

781. The Sovereign may, it seems, be a trustee (*n*), but since he cannot in law be seised to a use (*o*), he cannot be compelled

(*r*) *R.* v. *Sanderson* (1809), Wight. 50. As to extents, see title CROWN PRACTICE.

(*s*) Vin. Abr. tit. Prerog. T, 2; *Willion* v. *Berkley* (1561), 1 Plowd. 223, 243.

(*t*) 2 Co. Inst. 713; *Willion* v. *Berkley*, *supra*.

(*a*) See p. 409, *ante*.

(*b*) Com. Dig. tit. Toll, G, 1. See also p. 408, *ante*.

(*c*) See as to borough English and gavelkind, p. 408, *ante*.

(*d*) Vin. Abr. tit. Prerog. T, 2; *Anon.* (1457), Jenk. 83.

(*e*) As to what these are, see Vol. VII., Part VII.

(*f*) *Compost* v. *Anon.* (1662), Hard. 315; Chitty, Prerogatives of the Crown, p. 377. But see *contra*, 2 Bl. Com., 14th ed., p. 31, where it is said that the exemption is due to the prerogative. The right exists in the case of the clergy, and if Finch's definition of a "prerogative" (namely, that which is law in no case of the subject, see note (*o*), p. 371, *ante*) be accepted, as it appears to have been by Blackstone, the Crown's exemption cannot be said to be a prerogative right. It arises (*semble*) from the fact that the King is head of the Church. See also title ECCLESIASTICAL LAW.

(*g*) 2 Bl. Com., 14th ed., 31, 32.

(*h*) *Compost* v. *Anon.*, *supra*; *Hotham* v. *Foster* (1758), 2 Gwill. 869. But the privilege attaches in the hands of a lessee (3 Cru. Dig. tit. Tithes, pl 78).

(*i*) *Ibid.* Chitty, Prerogatives of the Crown, p. 377. The prescription does not revive if the land comes again into the hands of the King by escheat or otherwise (*ibid.*).

(*k*) 3 Cru. Dig. tit. Tithes, pl. 78.

(*l*) Bac. Abr. tit. Prerog. E, 1; Chitty, Prerogatives of the Crown, p. 378. See title COPYHOLDS.

(*m*) See Vol. VII., Part VII., sect. 6.

(*n*) Chitty, Prerogatives of the Crown, p. 378.

(*o*) *Willion* v. *Berkley* (1561), 1 Plowd., at p. 238; Bac. Abr. tit. Prerog. E, 1;

to execute the trust (*p*), and in effect holds lands so vested in him discharged therefrom (*q*).

782. The Sovereign may be a *cestui que use*, it is said, if both the conveyance and the declaration of use be by matter of record (*r*.)

783. The Sovereign may be appointed executor, but as he cannot be presumed to have leisure to perform the duties, he may nominate such persons to do so as he thinks fit, against whom actions may be brought. He may also appoint others to take accounts of such executors (*s*).

Rents.

784. The Crown may, in general, reserve rents to a stranger, though a subject may not do so (*t*). But a reservation of rent to an officer for the time being, who is removable at will, is bad (*a*).

So also the Crown may, it seems, reserve rents out of incorporeal hereditaments as commons, tithes, or fairs (*b*).

Distress.

785. The Crown could at common law distrain without attornment (*c*); and may distrain for a rent service, fee farm rent, rent-charge, or rent-seck, whether acquired by grant or forfeiture, upon the lands out of which the rent is reserved, or upon all other lands of the tenant, although held of other lords, provided the lands are in the actual possession of the tenant; if they are underlet for years or at will, the goods of the under-tenant are not liable (*d*) unless the lands were underlet after the rent accrued due to the Crown (*e*).

The Crown may, perhaps, distrain on the highway (*f*).

The prerogatives relating to distress do not, in general, pass to the Crown's grantee (*g*); but in certain cases the grantees of fee farm rents may distrain on all the lands of the original grantor (*h*).

1 Cru. Dig. tit. Use, cap. III., s. 8. On this ground the King could not convey by the old forms of bargain and sale, covenant to stand seised, or lease and release (Chitty, Prerogatives of the Crown, p. 378).

(*p*) 1 Cru. Dig. tit. Use, cap. III., s. 8; Bac. Abr. tit. Prerog. E, 1.

(*q*) *Ibid.*

(*r*) Bacon, Law Tracts, Reading on the Statute of Uses, 349 (Collected Works (Spedding), vii., 438).

(*s*) 4 Co. Inst. 335; Bac. Abr. tit. Prerog. E, 1; Chitty, Prerogatives of the Crown, p. 379.

(*t*) Co. Litt. 143 b; 2 Roll. Abr. 447; *Saffron Walden Case* (1583), Moore (K. B.), 159, 162.

(*a*) *Anon.* (1694), 1 Ld. Raym. 36.

(*b*) Bac. Abr. tit. Prerog. E, 3; Co. Litt. 47 a, note (1).

(*c*) Co. Litt. 309 b; and see title DISTRESS.

(*d*) 2 Co. Inst. 132, 184; 4 *ibid.* 119; Bro. Abr. tit. Prerog. 68, 77; Vin. Abr. tit. Prerog. F; Bac. Abr. tit. Prerog. E, 3; Chitty, Prerogatives of the Crown, p. 209. The Crown can, it seems, distrain, although the lands are under a sequestration out of Chancery; *A.-G.* v. *Coventry Corporation* (1715), 2 Vern. 713; 1 P. Wms. 306, though this is doubtful (*ibid.*, 1 P. Wms. 307).

(*e*) 1 Roll. Abr. 670.

(*f*) 2 Co. Inst. 131.

(*g*) Bro. Abr. tit. Prerog. 68; Vin. Abr. tit. Prerog. F.

(*h*) Namely, fee farm and other rents sold under the statute 22 Car. 2, c. 6, to which all remedies of the Crown are applicable (see *ibid.*, s. 8). See also 26 Geo. 3, c. 87; 30 Geo. 3, c. 50; Crown Lands Act, 1794 (34 Geo. 3, c. 75). This

SECT. 15. General Rights of the Crown in Relation to Property.

A tenant may, it seems, replevy on a distress for rent by the Crown (*i*), but not on a distress for fee farm rent (*k*), or other duty to the Crown (*l*).

Crown leases.

786. Where Crown leases are made with a clause of re-entry on non-payment of rent, no demand for payment is required, but on non-payment the Crown may re-enter (*m*). This right does not, however, extend to the Crown's grantee (*n*); nor to lands in the Duchy of Lancaster (*o*); nor, it seems, where there is an express provision requiring demand either in a lease made originally by the Crown, or by some other person of whom the Crown has acquired the reversion (*p*).

Copyright and printing.

787. With regard to literary property, the Crown exercised a prerogative in respect of printing and publishing before the creation of statutory copyright (*q*). The King had the sole right of

right applies, it seems, where the lands are in sequestration (see references in note (*d*) on p. 495, *ante*).

(*i*) Bro. Abr. tit. Replevin, 51; Bac. Abr. tit. Replevin, C.

(*k*) *R.* v. *Oliver* (1717), Bunb. 14. See as to a seizure in order to condemnation, *Cawthorne* v. *Campbell* (1790), Anst. 205, note at p. 212.

(*l*) See the references in note (*k*), *supra*. As to distress generally, see title DISTRESS.

(*m*) Co. Litt. 201 b; Bro. Abr. tit. Prerog., pl. 101; *Boroughes' Case* (1596), 4 Co. Rep. 72 b, 73 a.

(*n*) Co. Litt. 201 b; *Boroughes' Case* (1596), 4 Co. Rep. 72 b, 73 a; *Buskin* v. *Edmonds* (1595), Moore (K. B.), 598; *Kidwelly* v. *Brand* (1551), Plowd. 69, 70; *Anon.* (1553), Dyer, 87 b.

(*o*) *Bonnye's Case* (1584), Moore (K. B.), 149, 154; *Saffron Walden Case* (1584), Moore (K. B.), 159, 161.

(*p*) *Knight's Case* (1584), Moore (K. B.), 199, 210.

(*q*) Until the year 1640 the Crown exercised an unlimited authority over the press, and this control was enforced by the summary powers of search, confiscation, and imprisonment given to the Stationers' Company, and by the supreme jurisdiction of the Star Chamber, which issued decrees regulating printing and the number of presses (4 Burr., *per* WILLES, J., at p. 2312). All printing was forbidden except by royal licence, which was conferred by proclamations, charters, decrees, or by the grant of letters patent from the Crown. The Star Chamber considered all infringements of royal letters patent as contempts of the royal authority, and on that theory supported any patent which the Crown thought proper to grant. The Statute of Monopolies was intended to check this mischief, directing that all grants of monopolies should be tried and determined according to the common law, but a proviso enacted that the statute should not extend to "any patent of privilege concerning printing." The Star Chamber, therefore, continued the same powers of enforcing obedience and punishing contempts (*ibid.*, at p. 2375). On the abolition of the Star Chamber in 1640 the King's authority was set at naught. All regulations of the press and restraints of unlicensed printing by proclamations, decrees of the Star Chamber, and charter powers given to the Stationers' Company were deemed to be illegal (*ibid.*, at p. 2314). The Licensing Act, 1662 (13 & 14 Car. 2, c. 33), prohibited the printing of any book unless it was first entered in the register of the Stationers' Company; and that all books relating to the common law should be printed under the licence of the Lord Chancellor, Lord Chief Justice, or Lord Chief Baron; of history and affairs of State under the licence of a Secretary of State; of heraldry by appointment of the Earl Marshal; of books of divinity, physic, philosophy, or other science or art, by appointment of the Archbishop of Canterbury or Bishop of London, or in the universities by the chancellor; but the rights of grantees under letters patent from the Crown were expressly reserved. This statute was revived by 1 Jac. 2, c. 7, and continued by 4 Will. & Mar. c. 24, but finally expired in

printing all ordinances of the State, as proclamations, Acts of Parliament, Orders in Council, and other State documents. The principle on which he enjoyed the prerogative was that such publications as relate to the government of the country should be published and preserved in a proper and correct state (*r*).

Bibles and prayer-books.

Similarly, as the King is the head of the Church as well as of the State, it is his care to preserve the purity of the Scriptures, and the royal prerogative is exercised with regard to the printing of the Bible and the Book of Common Prayer (*s*).

Right to print.

The royal prerogative has been exercised from time to time by the grant of letters patent from the Crown (*t*), conferring upon the patentees the sole right of printing Bibles, prayer-books, Acts of Parliament, law books and judicial proceedings, and almanacs (*a*).

(1694), 4 Burr. at p. 2314. Statutory copyright was created in 1710 by stat. 8 Ann. c. 19.

(*r*) *Manners* v. *Blair* (1826), 2 State Tr. (N. S.) 215, *per* Lord HERMAND, at p. 226; *Grierson* v. *Jackson* (1794), Ridg. L. & S. 304.

(*s*) This prerogative is not referable to the circumstance of the King being in a spiritual or ecclesiastical sense the supreme head of the Church, but to the kingly character—to his being the head of the Church and State, and it being his duty to act as guardian and protector of both—a character he has equally in Scotland and England. It is therefore his duty to take care that such works are published in a correct and authentic form (*Manners* v. *Blair*, *supra*, *per* Lord LYNDHURST, L.C., at p. 236; and see title COPYRIGHT AND LITERARY PROPERTY).

(*t*) Since the Restoration, in cases relating to the grant of letters patent under the royal prerogative, the claim of the patentee has been based upon the right of property belonging to the Crown. As to Rolle's Abridgement it was said that the Year-Books, having been compiled at the King's expense, were the King's property, and therefore the printing of them belonged to the King's patentee (*Atkyn's Case* (1666), Cart. 89). In respect of Croke's Reports it was contended that the King paid the judges, who made the decisions, and therefore the decisions were his (*Roper* v. *Streater* (1670), Skin. 234). An almanac, it was argued, had no certain author, and was the King's property (*Stationers' Co.* v. *Seymour* (1678), 1 Mod. Rep. 256). The English translation of the Bible had been made at the King's expense, and therefore it was concluded to be his property. For the same reason it was thought that the King had property in the Latin Grammar. The whole right rested upon the common law proprietary interest of the Crown by reason of the King's right of original publication (*Millar* v. *Taylor* (1769), 4 Burr. 2303, *per* Lord MANSFIELD, C.J., at pp. 2402, 2405; see also *Nicol* v. *Stockdale* (1785), 3 Swan. 687).

(*a*) *Oxford and Cambridge Universities* v. *Richardson* (1802), 6 Ves. 689 (Bible and prayer-book); *Manners* v. *Blair*, *supra* (Bible and prayer-book); *Baskett* v. *Cambridge University* (1743), 1 Wm. Bl. 105 (grant to King's printer of all statutes, books, Acts and other volumes published by the King in English, the Latin Grammar excepted, also Bibles, testaments, as well as service books; concurrent authority to the university); *Baskett* v. *Cunningham* (1762), 1 Wm. Bl. Rep. 370 (Bible); *Roper* v. *Streater*, *supra* (Law Reports); *Atkyn's Case* (1666), Cart. 89 (Law Reports). The sole right of printing almanacs was granted by royal letters patent, and their validity was upheld (*Stationers' Co.* v. *Seymour*, *supra*; see also *Lee's Case* (1681), 2 Cas. in Ch. 76, 93). The prerogative right was disputed, however, in *Stationers' Co.* v. *Partridge* (1709), 10 Mod. Rep. 105, but no decision given. In *Stationers' Co.* v. *Carnan* (1775), 2 Wm. Bl. 1002, it was held that there was no royal prerogative with regard to the publication of almanacs (see also *Millar* v. *Taylor* (1789), 4 Burr. 2329; *Gurney* v. *Longman* (1806), 13 Ves. 508). The claim of the Crown to print the Latin Grammar, on the ground that the work was originally compiled at the King's expense, appears to have been abandoned (see *Stationers' Co.* v. *Partridge* and *Nicol* v. *Stockdale*, *supra*).

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The right of printing conferred upon the grantee under royal letters patent is apparently a licence to print and publish, and the grant does not amount to an assignment of the copyright, which remains in the Crown (*b*).

Copyright in State papers.

788. The King has no prerogative over printing generally. He cannot grant an exclusive right to print any book, except upon the basis of a proprietary interest in the particular work (*c*). He has, however, the same right of acquiring copyright as a private individual. Thus, if a servant of the Crown in the course of his duty, for which he is paid, composes any document, or if a person is specially employed and paid by the Crown for the purpose of composing any document, the copyright belongs to the Crown (*d*).

The Crown allows, however, the reproduction of certain classes of Government publications by any person without restriction, in the interests of the public, in order that they may be made known as widely as possible (*e*).

There is no prerogative with regard to works of which there is no copyright owner. If there is no certain author of a published book, the copyright does not belong to the Crown under the law relating to *bona vacantia* (*f*). The work falls into the public domain, and any person may print and publish it.

(*b*) *Oxford and Cambridge Universities* v. *Richardson* (1802), 6 Ves., *per* Lord ELDON, L.C., at p. 712. The King had power, accordingly, to grant the right of printing Acts of Parliament to the King's printer, and by similar letters patent a concurrent authority to print the same to the University of Cambridge (*Baskett* v. *Cambridge University* (1758), 1 Wm. Bl. 105).

(*c*) *Millar* v. *Taylor* (1769), 4 Burr. 2303, *per* Lord MANSFIELD, C.J., at p. 2401.

(*d*) Upon this principle the Crown exercises its right or maintains its interest in copyright in certain classes of works, which are published at the expense of the Executive for the purpose of promoting literature and science. Such works are protected, and their reproduction is restricted as being of the same character as those which are published by private enterprise. Among such works are included: (1) Literary or *quasi*-literary works, *e.g.*, the Reports of the "Challenger" Expedition, the Rolls Publications, State Trials, and the Board of Trade Journal; (2) charts and ordnance maps (see Treasury minute, 31st August, 1887, and title COPYRIGHT AND LITERARY PROPERTY). The printing and publishing of a nautical almanac is by Act of Parliament placed under the control of the Lords of the Admiralty (9 Geo. 4, c. 66).

(*e*) Government publications within this category may be classified as follows:—(1) Reports of select committees of the two Houses of Parliament or of Royal Commissions; (2) papers required by statute to be laid before Parliament, *e.g.*, Orders in Council, rules made by Government departments, accounts, reports of Government inspectors; (3) papers laid before Parliament by command, *e.g.*, treaties, diplomatic correspondence, reports from consuls and secretaries of legation, reports of inquiries into explosions or accidents, and other special reports made to Government departments; (4) Acts of Parliament; (5) official books, *e.g.*, King's Regulations for the Army or Navy. Subject, however, to the following exceptions:—(1) Acts of Parliament and official books, published under the authority of the Government and reproduced by an individual, must not purport on the face of them to be published by authority; (2) works of a literary or *quasi*-literary character which accidentally come within these classes, *e.g.*, reports of the Historical Manuscripts Commission (see Treasury minute, 31st August, 1887).

(*f*) *Millar* v. *Taylor*, *supra*, *per* Lord MANSFIELD, C.J., at p. 2401. For *bona vacantia* generally, see Vol. VII., Part VII., sect. 3.

The Crown cannot, apart from the rules of law relating to the licensing of stage plays (*g*), or to blasphemous or seditious libels (*h*), exercise any control over the public press (*i*).

(*g*) See title THEATRES.
(*h*) See titles CRIMINAL LAW AND PROCEDURE; LIBEL AND SLANDER.
(*i*) See title PRESS AND PRINTING.

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BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

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